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No. 12501

United States
Court of Appeals
For the Ninth Circuit.

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Montana.

FILED

AUG 4 1950

PAUL P. O'BRIEN,
CLERK

No. 12501

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Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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401 Broadway,
New York, N. Y.

J. F. EMIGH,
47 North Main,
Butte, Montana,
Attorneys for the Defendant.

In the United States District Court for the District
Of Montana, Great Falls Division

No. 8088

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MEYER SCHNEIDER,
Defendant.

INDICTMENT

The Grand Jury Charges:

Count One

(Offer of Bribe)

(18-201)

That on or about the 22nd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity,

as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid.

Count Two

(Bribery)

(18-201)

That on or about the 23rd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously did give a sum of money, to-wit: One Thousand Five Hundred (\$1500.00) Dollars, to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influ-

ence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid.

A True Bill.

H. R. SCHUYLER,

Foreman.

HARLOW PEASE,

Acting United States Attorney.

[Endorsed]: Filed June 9, 1949.

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

The defendant moves that the indictment brought against him be dismissed upon the ground:

I.

1. That the Indictment does not state facts sufficient to constitute an offense against the United States.

2. For the reason that said Indictment is defective in that it charges in each count of said Indictment that the defendant unlawfully and feloniously

promised or gave money to a certain officer and person acting for and in behalf of the United States in an official function, it charges that Harvey B. Apperson was an officer and person acting for and in behalf of the United States in an official capacity and function, but in neither count of said Indictment does it describe the duties or official function of the said Apperson as an officer or as a person the defendant sought to bribe or did bribe.

3. That the said Indictment charges but one offense in two counts, and that the facts alleged in count One of said Indictment comprise a part and portion of the substantive offense charged in count Two of said Indictment.

4. That said Indictment is too vague, indefinite and uncertain as to the facts charged and the particular circumstances of the facts charged to apprise and inform this defendant of the nature of the acts alleged to have been done by him constituting the offense charged, either as to count One or count Two, of said Indictment.

II.

That the defendant separately moves that count One of the said Indictment be dismissed upon the following ground:

1. That count One of said Indictment does not state facts sufficient to constitute an offense against the United States.

2. That the Grand Jury in said count One charges the defendant with offering to bribe and then alleges promising money to a certain officer and person, which constitutes a fatal variance between the crime charged and the facts alleged to constitute a commission thereof.

3. That the defendant is not apprised by said count One whether it will be sought to prove that he promised money to an officer or person with intent to influence the decision of such officer or person acting as an officer in behalf of the United States in an official function, or whether he offered money to an officer or person acting as a person in an official function in behalf of the United States.

4. That the defendant is not apprised and informed by said count One in respect to what particular official functions or duties, in behalf of the United States, the person or officer to whom it is alleged money was promised to influence the decision and action upon, and in what respect the decision and action of said person or officer was intended to be influenced by the promise of money on the part of the defendant.

5. That count One of said Indictment does not apprise the defendant of the nature of the lawful duty of the said officer and person in regard to which it is alleged defendant sought to induce said officer and person to do an unlawful act and the nature of the unlawful act which it will be sought

to prove he attempted to induce the officer and person to do.

6. That said Indictment is too vague, indefinite and uncertain as to the facts charged and the particular circumstances of the facts charge to apprise this defendant of the nature of the acts alleged to have been done by him constituting the offense charged as to count One of said Indictment.

III.

That the defendant further separately moves that count Two of said Indictment be dismissed on the following ground:

1. That count Two of said Indictment does not state facts sufficient to constitute an offense against the United States.

2. That the defendant is not apprised and informed by said count. Two in respect to what particular official functions or duties, in behalf of the United States, the person or officer to whom it is alleged money was given to influence the decision and action upon, and in what respect the decision and action of said person or officer was intended to be influenced by the gift of money on the part of the defendant.

3. That count Two of said Indictment does not apprise the defendant of the nature of the lawful duty of the said officer and operson in regard to which it is alleged defendant sought to induce said officer or person to do an unlawful act and the

nature of the unlawful act which it will be sought to prove he attempted to induce the officer or person to do.

Dated this 10th day of December, 1949.

/s/ H. R. EICKEMEYER,

/s/ L. M. LEIBOWITZ,

/s/ J. F. EMIGH,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 12, 1949.

MINUTE ORDER ENTERED
DECEMBER 12, 1949.

Defendant was duly called for arraignment, plea and trial this day, said defendant being personally present in Court with his attorney, Mr. H. R. Eickemeyer, and Messrs. Franklin A. Lamb and Emmett C. Angland, Assistants to the United States Attorney, being present and appearing for the United States.

Thereupon, on motion of Mr. Eickemeyer, Court ordered that Mr. Louis M. Leibowitz of New York City, N. Y., be admitted to practice for the purposes of this case, and that his name, and the name of Mr. J. F. Emigh of Butte, Montana, be entered as associate counsel for defendant.

Thereupon counsel for defendant filed and pres-

ented to the Court a motion to dismiss the indictment herein, and a memo of authorities in support of the motion, whereupon Mr. Lamb asked that the record show that the motion to dismiss was served on the United States Attorney at 9:50 a.m., and the memo of authorities was served at 9:57 a.m. on the day set for the arraignment, plea and trial of the defendant, and that acceptance of service of said motion and memo is done without waiver of any right that the government may have.

Thereupon Court ordered that the jury be excused from the Court room while the motion to dismiss is heard, whereupon, in the absence of the jury, said motion to dismiss was duly argued by counsel and submitted. Thereupon, after due consideration, Court ordered that said motion to dismiss the indictment be and is overruled, to which ruling of the Court the defendant excepted and exception duly noted.

Thereupon the defendant was duly arraigned and answered that his true name is Meyer Schneider. Thereupon the defendant waived the reading of the indictment and entered a plea of not guilty.

Thereupon the impanelling of a jury was proceeded with, whereupon further trial of the cause was ordered continued until 10:00 a.m. tomorrow and all jurors now in attendance were duly admonished by the Court and excused until that time.

Entered in open Court at Great Falls, December 12, 1949.

H. H. WALKER,
Clerk.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT
OF ACQUITTAL

Come Now the defendant, Meyer Schneider, and upon the close of the testimony in behalf of plaintiff, moves that this Honorable Court order and instruct the jury to forthwith return a verdict of not guilty as to Count One of the Indictment upon the grounds that:

1. There is not sufficient evidence to warrant his conviction or to establish a prima facie case in behalf of plaintiff:

2. That there is not sufficient evidence to establish beyond a reasonable doubt that this defendant committed the acts charged in Count One of the Indictment.

3. That it affirmatively appears from the evidence herein that the Officers of the United States induced, enticed, persuaded and by representation lured the defendant to commit the acts charged in Count One of the Indictment in order to entrap, arrest and prosecute him therefor.

And defendant further moves this Court to order and instruct the Jury to forthwith return a verdict of not guilty as to Count Two of the Indictment upon the grounds that:

1. There is not sufficient evidence to warrant his

conviction or to establish a prima facie case in behalf of plaintiff.

2. There is not sufficient evidence to establish beyond a reasonable doubt that this defendant committed the acts charged in Count Two of the Indictment.

Dated this day of December, 1949.

/s/ J. F. EMIGH,
Attorneys for Defendant.

[Endorsed]: Filed December 15, 1949.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT
OF ACQUITTAL

Comes Now the defendant above named, Meyer Schneider, and upon the close of testimony in behalf of the plaintiff and defendant and upon both parties, plaintiff and defendant, having rested, moves that this Honorable Court order and instruct the Jury to forthwith return a verdict of not guilty as to count One of the Indictment, upon the ground and for the reason:

1. That said Indictment does not state facts sufficient to constitute the crime charged in count One of said Indictment, or any other count.

2. That there is not sufficient evidence to war-

rant his conviction or to establish a prima facie case in behalf of plaintiff.

3. That there is not sufficient evidence to establish beyond a reasonable doubt that this defendant committed the acts charged in count One of the Indictment.

4. That it affirmatively appears from the evidence herein that the officers of the United States induced, enticed, persuaded and by representation lured the defendant to commit the acts charged in count One of the Indictment in order to entrap, arrest and prosecute him therefor.

5. That no evidence has been introduced whatsoever establishing the functions or duties of Harvey B. Apperson acting as a person.

6. That the evidence fails to prove and establish any authority on the part of Harvey B. Apperson acting as a person or officer to consummate or do the things and matters which the evidence discloses it is claimed defendant sought to influence or induce the said Harvey B. Apperson to do.

7. That there is a fatal variance between the allegations of count One of the Indictment and the evidence introduced by the Government in this, to wit: That there is no legal evidence establishing Harvey B. Apperson to be a "Base Salvage Officer of the Great Falls United States Air Force Base."

8. That there is a fatal variance between the charge in the Indictment and the proof in that the

first count of the Indictment charges the person sought to be influenced in an official function and capacity is "Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base;" whereas the only competent proof tending to establish the official capacity and official function of the person to whom the evidence tended to show an offer of bribe or a bribe was made to influence in an official function or capacity was one First Lt. Harvey D. Apperson, Jr., or Harvey O. Apperson, Jr., Salvage and Property Disposal Officer.

And defendant further moves this Court to order and instruct the Jury to forthwith return a verdict of not guilty as to count Two of the Indictment, upon the ground and for the reason:

1. That said Indictment does not state facts sufficient to constitute a crime charged in count Two of said Indictment, or any other count.

2. That there is not sufficient evidence to warrant his conviction or to establish a prima facie case in behalf of plaintiff.

3. That there is not sufficient evidence to establish beyond a reasonable doubt that this defendant committed the acts charged in count Two of the Indictment.

4. That is affirmatively appears from the evidence herein that the officers of the United States

induced, enticed, persuaded and by representation lured the defendant to commit the acts charged in count Two of the Indictment in order to entrap, arrest and prosecute him therefor.

5. That no evidence has been introduced whatsoever establishing the functions or duties of Harvey B. Apperson acting as a person.

6. That the evidence fails to prove and establish any authority on the part of Harvey B. Apperson acting as a person or officer to consummate or to do the things and matters which the evidence discloses it is claimed defendant sought to influence or induce the said Harvey B. Apperson to do.

7. That there is a fatal variance between the allegations of count Two of the Indictment and the evidence introduced by the Government in this, to wit: That there is no legal evidence establishing Harvey B. Apperson to be a "Base Salvage Officer of the Great Falls United States Air Force Base."

8. That there is a fatal variance between the charge in the Indictment and the proof in that the second count of the Indictment charges the person sought to be influenced in an official function and capacity is "Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base;" whereas the only competent proof tending to establish the official capacity and official function of the person to whom the evidence tended to show an offer of bribe or a bribe was made to in-

fluence in an official function or capacity was one 1st Lt. Harvey D. Apperson, Jr., or Harvey O. Apperson, Jr., Salvage and Property Disposal Officer.

Dated this 15th day of December, 1949.

H. R. EICKEMEYER,
LOUIS M. LEIBOWITZ,
J. F. EMIGH,
Attorneys for Defendant.

Endorsed]: Filed December 15, 1949.

[Title of District Court and Cause.]

**MOTION FOR WITHDRAWAL OF COUNT
ONE FROM THE CONSIDERATION OF
JURY**

Comes now the above named defendant, Meyer Schneider, and at the close of the case by both plaintiff and defendant, moves this Honorable Court to withddraw from the consideration of the Jury count One of the Indictment herein on the grounds and for the reason:

1. That is now affirmatively appears from the evidence of the Government and defendant herein that the facts charged and alleged in count One of the said Indictment do not constitute a separate and distinct crime from the matters, facts and things charged in count Two of the Indictment, but

in fact and law constitute a part and portion of the same transaction charged and not a separate and distinct offense;

2. That the matters and facts charged in count One of the Indictment constitute a part and portion of the transaction charged in count Two of the Indictment, to wit, the offense of bribery, and that the acts charged in count One of the Indictment now affirmatively appear from the evidence as a matter of fact and law are merged in the offense charged in count Two of the Indictment;

3. That the evidence now affirmatively discloses that the offense, if any, charged in count One of the Indictment as now disclosed by the evidence constitutes merely a portion of a greater and consummated offense, namely, the offense charged in count Two of the Indictment.

/s/ H. R. EICKEMEYER,

/s/ LOUIS LEIBOWITZ,

/s/ J. F. EMIGH,

Attorneys for Defendant.

[Endorsed]: Filed December 15, 1949.

MINUTE ORDER ENTERED
DECEMBER 15, 1949

Defendant and counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon counsel for defendant filed and presented to the Court a motion for judgment of acquittal, whereupon Court ordered that the jury retire from the court room while said motion is heard. Thereupon, in the absence of the jury, said motion was duly argued by counsel, submitted and by the Court taken under advisement. Thereafter, the Court after due consideration, ordered that said motion for judgment of acquittal be and is denied, to which ruling of the Court the defendant excepted and exception duly noted.

Thereupon the defendant announced that he will offer no evidence and that the defense rests, whereupon the evidence closed.

Thereupon counsel for defendant filed and presented to the Court a second motion for judgment of acquittal containing some additional matter to that contained in the first motion filed, which motion was submitted without argument and by the Court denied, to which ruling of the Court defendant excepted and exception duly noted.

Thereupon counsel for defendant filed and presented to the Court a motion for withdrawal of Count One from the Consideration of the jury, which motion was submitted without argument and by the Court denied, to which ruling of the Court

the defendant excepted and exception duly noted.

Entered in open Court December 15, 1949.

H. H. WALKER,
Clerk.

District Court of the United States, District of
Montana, Great Falls Division

No. 8088

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MEYER SCHNEIDER,

Defendant.

VERDICT

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the Indictment on file herein.

CLAUDE K. DUNCAN,
Foreman.

[Endorsed]: Filed December 15, 1949.

In the District Court of the United States in and
For the District of Montana, Great Falls Division

No. 8088, Criminal

UNITED STATES OF AMERICA,

vs.

MEYER SCHNEIDER.

JUDGMENT AND COMMITMENT

(Indictment in two counts, for violation of U.S.C.
Title 18, Sec. 201.)

On this 15th day of December, 1949, came the United States Attorney, and the defendant appearing in proper person and by his counsel, Mr. H. R. Eickemeyer, Mr. J. F. Emigh and Mr. Louis M. Leibowitz.

And the defendant having been convicted on the verdict of the jury of the offenses charged in the Indictment in the above entitled cause, to-wit: that on or about the 22nd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Har-

vey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid, as charged in Count One of the Indictment herein, and that on or about the 23rd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously did give a sum of money, to-wit: One Thousand Five Hundred (\$1500.00) Dollars, to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the com-

mission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid, as charged in Count Two of the Indictment herein.

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is by the Court Ordered and Adjudged that the said defendant, having been found guilty of said offense, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for the term of One Year and Six Months, and that he pay a fine in three times the sum of \$1500.00, the amount involved herein, being the sum of \$4500.00, and that said defendant be further imprisoned until payment of said fine or until said defendant be otherwise discharged as provided by law.

It is further ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as the Commitment herein.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered December 15, 1949.

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I. H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby Certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

Witness my hand and seal of said Court this
15th day of December, 1949.

H. H. WALKER,
Clerk.

[Seal] By ELIZABETH C. McKEE,
Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Meyer Schneider, 369 Cherry Street, New York City, New York.

Names and Addresses of Appellant's Attorneys: H. R. Eickemeyer, 429 Ford Building, Great Falls, Montana; Louis M. Leibowitz, 401 Broadway, New York City, New York; J. F. Emigh, 47 North Main, Butte, Montana.

Offenses: Count One: Offer of Bribe, violation of Title 18, Section 201, United States Codes Annotated;

Count Two: Bribery, violation of Title 18, Section 201, United States Codes Annotated;

Concise Statement of Judgment: Judgment of Conviction December 15, 1949;

Sentence: Judgment on two counts combined, fined in the sum of Four Thousand Five Hundred Dollars (\$4500.00), imprisonment for one (1) year and six (6) months.

Order of Court Denying New Trial: December 16th, 1949;

Order of Court Denying Motion in Arrest of Judgment, December 16th, 1949;

Name of Institution Where Now Confined if Not on Bail: On bail;

I, the above named Appellant, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the above named judgment.

Dated this 16th day of December, 1949.

H. R. EICKEMEYER,
LOUIS M. LEIBOWITZ,
J. F. EMIGH,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing constitutes a full, true and correct copy of the Judgment Roll, and of the Notice of Appeal, filed in Criminal Case Number 8088, United States of America vs. Meyer Schneider, as appears from the original files and records of said case in said Court and now remaining in my custody as such Clerk.

Witness my hand and the seal of said Court at Great Falls, Montana, this 15th day of March, A. D. 1950.

H. H. WALKER,
Clerk as aforesaid,

[Seal] /s/ By C. G. KEGEL,
Deputy Clerk.

In the District Court of the United States, in and
for the District of Montana, Great Falls Division

Criminal Action No. 8088

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MEYER SCHNEIDER,

Defendant.

Before: Honorable Charles N. Pray, United States
District Judge, with a jury, at Great Falls,
Montana, on December 12, 13, 14, and 15th,
1949.

APPEARANCES

MR. FRANKLIN A. LAMB,
Assistant United States Attorney,
Billings, Montana,

MR. EMMETT C. ANGLAND,
Assistant United States Attorney,
Great Falls, Montana,
For Plaintiff.

MR. H. R. EICKEMEYER,
Great Falls, Montana,

MR. J. F. EMIGH,
Butte, Montana,

MR. LOUIS M. LEIBOWITZ,
401 Broadway,
New York, N. Y.,
For Defendant.

PROCEEDINGS

Be It Remembered, that the above entitled cause came on regularly for trial in the United States District Court in and for the District of Montana, Great Falls, Montana, on December 12, 13, 14, and 15th, 1949, before the Honorable Charles N. Pray, United States District Judge, sitting with a jury, at which time the following proceedings were had and done, to wit:

The Court: Gentlemen, have you any ex parte matters this morning?

Mr. Lamb: I have none, your Honor.

Mr. Angland: None, your Honor.

The Clerk: Well we will go to the case on trial on the calendar. The Clerk will call the case.

The Clerk: United States vs. Meyer Schneider.

Mr. Eickemeyer: If the court please, the defendant, Meyer Schneider, is in the court room, and I would like to have the record show that H. R. Eickemeyer of Great Falls, J. F. Emigh of Butte, and Louis M. Leibowitz of New York City, are the attorneys for the defendant. Mr. Leibowitz is a member of the Bar of the State of New York and I would like to have him admitted for the purposes of this case.

The Court: The record will show his admission.

Mr. Eickemeyer: At this time we wish to make and file a motion to dismiss the indictment, and I have here, which this motion has been served on the District Attorney, and I [2*] also wish to hand

* Page numbering appearing at bottom of page of original Reporter's Transcript.

the court a memorandum of authorities which we have so that you can follow Mr. Emigh, who will make the argument, and you can follow the argument.

Mr. Lamb: At this time we would like to have the record show the motion to dismiss now filed with the Clerk was served on the United States Attorney at ten minutes to ten on the morning of the time set for the plea and arraignment and trial of the defendant, and the memorandum of authorities was served at three minutes to ten on that same day, and that the acceptance of service was done without waiver of any rights on behalf of the United States of America because of the shortness of time.

The Court: I think probably we had better let the jury retire to the Clerk's office or Marshal's office and remain there within call while we are discussing these propositions of law. Some reference might be made to facts. You may retire, ladies and gentlemen jurors to the Clerk's office or the Marshal's office in charge of the Marshal.

(Whereupon the jurors left the court room.)

The Court: I suppose, Mr. Emigh, you can cover your memorandum so it won't be necessary to dwell upon it as anticipated in a motion to dismiss. I have given some attention to this question myself and I think I found similar cases Saturday when you talked to me about it.

Mr. Emigh: Yes. [3]

The Court: I have also been examining some

of the same authorities you have. So you may proceed, Mr. Emigh, with your argument.

Mr. Emigh: May it please the Court, before addressing the Court on this matter I want to express the appreciation of counsel and the defendant for the courtesy the Court in continuing the arraignment until this day, and the tolerance of the Court in hearing this motion at this time. I think the Court has been very courteous to us in the matter, and I also wish to thank Government counsel for their courtesy. Now, your Honor, I am going to read with the permission of the Court our motion, the motion I am addressing the Court in regard to and attempt to take up in the best order the different elements which go into the merits of that motion.

(Mr. Emigh orally argued the motion.)

(Mr. Lamb orally argued in behalf of the plaintiff.)

(Mr. Leibowitz orally argued on the motion.)

(Mr. Eickemeyer argued the matter orally.)

(Mr. Lamb argued further.)

The Court: Well, gentlemen, of course, the court and the District Attorney very likely anticipated that you would come in here the last moment and serve copies of your motions and your authorities on the other side, so in the meantime the court has given some attention to this indictment, knowing what happened to the first one, and has tried to cover the [4] ground pretty thoroughly, and has examined the authorities, or most of them

that you gentlemen have cited, and tried to read them very carefully; and I finally came to this conclusion: That the only thing about this indictment I ought I ought to give particular attention was the question of the description of the duties and something with reference to the act performed, the act itself. Well I found authorities citing something like this: An indictment which charges a person with offering a bribe to an officer to influence his official action concerning the sale of certain government property is sufficient, although it fails to allege that this property in question was owned by the Government. The particular act involved and the special duties of the officer in question need not be set forth. Now I found some very good authorities for that I thought. One of the cases which you may have cited in your memorandum here was *United States vs. Boykin* 11 Fed. 2 484, but I didn't find very much encouragement in that in support of your position. Now those were the particular matters that impressed me. And after going over this indictment as carefully as I could and looking up different authorities in connection with the allegations here, I then came to the conclusion that the only question remaining that I must consider and solve as best I could relating to the particular act influence and the specific duties of the officer. In my judgment the only merit to your [5] contentions is involved there, and on investigating that situation the best I could

I have come to the conclusion that this indictment is good and states a charge of a public offense against the defendant. So without taking any more time on the matter I am going to overrule the motion. You may call in the jury.

Mr. Emigh: May the record show an exception on behalf of the defendant?

The Court: Very well.

(Whereupon the jurors returned to the court room.)

The Court: Are you ready to proceed, gentlemen?

Mr. Lamb: The Government is ready.

Mr. Eickemeyer: Yes, your Honor.

The Court: Call the jury.

Mr. Eickemeyer: If the court please, I imagine we had better plead before we draw the jury.

The Court: I think we had better. Let the defendant come forward. The court in allowing so much laxity——

Mr. Eickemeyer: If the court please, we represent the defendant and we waive the reading of the indictment and enter a plea of not guilty. And his true name is Meyer Schneider as set forth in the indictment.

The Court: All right.

(Whereupon the prospective jurors were called and duly sworn.) [6]

Whereupon Mr. Lamb made the opening statement of the case to the jury.

Mr. Lamb proceeded to examine the prospective jurors.

Mr. Eickemeyer proceeded to examine the prospective jurors.

The Court: We will suspend here, Mr. Eickemeyer.

(12:00 noon.)

(Whereupon the court admonished the jurors.)

The Court: Court is in recess until 2:00 o'clock.

Court resumed, pursuant to recess, at 2:00 o'clock p.m., on December 12, 1949, at which time the jury, defendant, and all counsel were present.

The Court: Proceed.

(Whereupon Mr. Eickemeyer proceeded to examine the prospective jurors.)

(Excerpt of examination of Mr. Gabriel.)

Q. (By Mr. Eickemeyer): If it should develop that Mr. Apperson should be a very material witness in this case and that you will have to pass upon the credibility of his testimony would that embarrass you to the extent you would rather be off this case?

A. Well, I don't know just how to answer that.

Q. What is that?

A. I don't know just how to answer that. I rather admired Apperson for not taking this so-called bribe at the time I read about it.

Mr. Eickemeyer: Well, if the court please, I think those remarks should be stricken from the records.

The Court: Yes, they may be off the record; they are not responsive.

Mr. Eickemeyer: And the court should make a statement the jury should not take into consideration those remarks.

The Court: Yes. The jury will disregard the remarks.

Mr. Eickemeyer: I think, if the court please, that the juror isn't in a position to act in this case. I think we have to challenge him for cause.

Mr. Lamb: We will not resist, your Honor, if that is their wish.

The Court: Very well, the juror may be excused. Call another juror.

The Clerk: C. M. Gibbons.

Mr. Leibowitz: Your Honor, may I be permitted to make a statement with reference to the last witness, last juror. If I am permitted to make it?

The Court: Make a statement in reference to him?

Mr. Leibowitz: Yes. [8]

The Court: It depends on what the statement is. What is it about?

Mr. Leibowitz: I think the gratuitous statement made by the last juror is very prejudicial to the defendant and I think under those circumstances that the panel should be stricken out and a new one called.

The Court: That—oh, no.

Mr. Leibowitz: Your Honor, that motion is denied?

The Court: Yes.

Mr. Leibowitz: May I have an exception to it.

The Court: Yes.

The Court: The jury, of course, will understand whoever heard that remark it is no part of the evidence in this case at all and is not to be considered by them in any respect whatsoever. It was a voluntary contribution on the part of the prospective juror, Gabriel; it is not to be thought of or considered by you at all. Now, of course, on any of the others that may be called here as jurors that are sitting in the back of the room and heard the remark this applies to; it is out of the record entirely. You may proceed.

(Whereupon examination of prospective jurors was resumed by Mr. Lamb and Mr. Eickemeyer.

The Court: Well, you apparently won't be able to get a jury tonight. I think when we get this jury we will [9] also get one or two alternate jurors so if anything does happen this work won't be for nothing.

Whereupon the court admonished the jurors.)

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock.

(5:00 p.m., December 12, 1949.)

(Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on December 13, 1949, at

which time the jurors, defendant, and all counsel were present.)

(Whereupon the court suggested that counsel expedite the examination of the jurors.)

The Court: The jury are all here. We now have the eighth challenge by the defendants.

Mr. Eickemeyer: Excuse Mr. Pappin.

(Mr. Lamb and Mr. Eickemeyer continued the examination of jurors.)

Court: Counsel, you have waived all your challenges; you may administer the oath to the jury.

(The Clerk administered the oath to the jury.)

The Court: Now at this time we will swear in an alternative juror.

The Clerk: Just one?

The Court: I think so.

The Clerk: Joseph S. Smith. [10]

Mr. Lamb: Are we going to select just one, your Honor?

The Court: Well, if you think you ought to have two.

Mr. Lamb: It doesn't make any difference to me.

The Court: Well, suppose you take two and be sure about it, just as a precaution.

(Whereupon Mr. Lamb and Mr. Eickemeyer examined the two alternate jurors.)

(Counsel passed the jurors for cause and waived challenges.)

The Court: Swear the alternate jurors.

(The alternate jurors were duly sworn.)

The Court: Now we will take a recess for about fifteen minutes.

(10:50 a.m.) [11]

Court resumed pursuant to recess at 11:05 a.m. at which time all of the counsel and the defendant were present, and the jury was present.

The Court: I think I will have to tell this jury and counsel not to get up, not to arise just for a recess. We have a sort of immemorial custom, you know, in the morning and when we convene court at noon, or at two o'clock in the afternoon to arise. It is simply an old custom. It is out of deference to judicial authority and that is all, don't get up any other time.

The Court: Now you may proceed, Mr. District Attorney.

Mr. Lamb: Thank you, your Honor.

Mr. Lamb: Ladies and Gentlemen, so that we will all understand the exact nature of the charge I will read to you the indictment which has been filed in the Clerk's office in this court. It is entitled: United States of America, Plaintiff, vs. Meyer Schneider, Defendant, Indictment No. 8088. The grand jury charges. Count one. Offer of bribe. Title 18, Section 201. That on or about the 22nd day of November, 1948, in the State and District of Montana, and within the jurisdiction of this court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and per-

son acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, [12] United States Air Force, and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson to allow and make opportunity for the commission of a fraud on the United States, and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States as aforesaid.

In Count two, Bribery, under Title 18, Section 201. That on or about the 23rd day of November, 1948, in the State and District of Montana and within the jurisdiction of this court, Meyer Schneider unlawfully and feloniously did give a sum of money, to wit: \$1,500.00 to a certain officer and person acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to

influence the decision and action of the said Harvey B. Apperson in [13] his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid. Signed a true Bill by the Foreman and by Mr. Pease as the Acting United States Attorney.

Counsel for the defendant has kindly read to you the names of most of the witnesses the Government has subpoenaed. In going back, the evidence which the Government will produce before you by way of bringing the witnesses here will show that the defendant, Meyer Schneider—that name is spelled S-c-h-n-e-i-d-e-r—is engaged together with his father and his brother in a salvage business in the City of New York on Cherry Street, I believe. And that some time along in the fall of 1948 the defendant noticed an advertisement or an invitation for bids or notice that there was an invitation for bids on salvage property out here at the East Base in a trade magazine, and that he wrote to the purchasing and contracting officer at the United States Air Base asking that he be for-

warded an invitation so that he could bid upon the sale of surplus [14] property, salvage property.

An invitation to bid was mailed to him and shortly thereafter, I believe it was in August or the first part of September, his bid for cotton rags, and a separate, the same bid for a separate item of wool rags was received from M. Schneider. With accompanying the bid was his deposit of \$500.00 as required in the invitation and specifications of the bid. His bid was high for those two items. There were other bidders for other items and there were also other bidders for, at least one on the cotton or wool rags. He was notified by the purchasing and contracting officer that his bid had been accepted. A considerable period elapsed before any further communication was had and finally the defendant, Meyer Schneider, wrote to find out whether he had been a successful bidder and at about that time he was actually being notified of the acceptance of his bid.

Under the terms of the contract he was to remove the property within a rather limited period of time, and after this period had expired he was notified by the purchasing and contracting officer he would have to get his property off the base or that his contract would be cancelled and the deposit appropriated depending upon the extent of the subsequent payment or the expense the Government might be put to by reason of his failure to pay the balance due.

About that time a long distance phone call was

received in the office of Harvey B. Apperson to a Private by the name of LaVaughn Walker. The call was from a man in New York City, who identified himself to the Private as being Meyer Schneider, and he asked him what overage there might be in the commodities which he had bid upon. By overage—by contract there is merely an estimate of the amount of weight as far as the particular commodities bid for and that it could be more and it could be less, and he was interested in learning how much overage. And the Private will testify that he advised him that he did not know exactly, and he was asked to tell him what was in the particular bundles of rags he had bought, and he was advised there were parkas and shirts and pants that had been declared as scrap material, not serviceable and not repairable as far as the Army was concerned.

Shortly after that a second telephone call was received from the defendant, Meyer Schneider, again directed to, this time particularly direct to Private Walker, at which time the defendant, Meyer Schneider, asked Private Walker, who was a clerk in the Salvage Office under the authority of Lieutenant Apperson, if there were any socks in this particular shipment or this particular commodity which he had bid for, bid upon and been awarded the contract.

The Private will testify that he told him there were socks in the materials which he had been awarded in the contract and he said: "Well, you know, I am just an ordinary sort of a [16] guy,

and could we do some swapping to get the socks out of the shipment." He was advised by the Private that he didn't know; that he would see what he could do about it. There was a third telephone call I think directed to Private Walker by the defendant, Meyer Schneider, and when Private Walker answered the phone, Lieutenant Apperson happened to be in the office and took the phone from the Private and told Meyer Schneider if there were any transactions to be conducted by the Salvage Office, they should be directed to him because he was in charge of it, and he was the Base Salvage Officer, and if he didn't get his commodities off the Great Falls Air Base, he would be required to cancel his contract and he would have to come out to Montana and make some arrangements for the shipment and to do it immediately.

Very shortly after that another telephone call was received at the Office of the Salvage Officer, again asking for Private Walker or Mr. Walker, and Lieutenant Apperson will testify that when he advised the operator that Private Walker was not in the office but that he was the Base Salvage Officer, the call having come from New York City, the party said he didn't want to talk with the Lieutenant, and no conversation took place at that time.

In the conversation which Lieutenant Apperson had with the defendant, Meyer Schneider, the defendant, Meyer Schneider, told Lieutenant Apperson that he would come to [17] Great Falls and be

here on the 15th day of November, if I recall the correct date. On the 15th the defendant failed to appear as he had indicated that he would, so at that time Lieutenant Apperson will testify he put in a collect call to the defendant, Meyer Schneider, and told him again that that contract was going to be cancelled if he didn't come out here and get his commodities and make arrangements for the shipment and he then told him he would be here on Monday, November 22nd, and he would contact him when he got in town.

Nothing further was heard until early morning or sometime the morning of November 22nd, and Lieutenant Apperson will testify that the defendant contacted him and they made an appointment for sometime in the morning shortly after ten o'clock, or something like that. Lieutenant Apperson will testify that on that particularly day he was O.D., as they call it in the Army, Officer of the Day, and his schedule of hours was from midnight of the 21st to noon the day of the 22nd, and then because he would be engaged in other duties he advised or told Sergeant Aulgur, the non-commissioned officer in charge of the salvage office that when the defendant, Meyer Schneider, arrived at the Air Base to go to the gate and pick him up and bring him to the office and he would be there shortly after ten o'clock. So on that particular day Sergeant Aulgur testified he received a call from the gate, got in an Army vehicle and went down to the gate and picked up the defendant and took

him to the base salvage office, and when they walked into the office they were reclassifying and laying out in separate lots some serviceable equipment that is normally designated in the Army as surplus property usable. The officer will testify in defining the difference between scrap or salvage property and surplus property. That these articles that were laid out through the long sort of a barracks and into the office where the salvage officer maintained his records were these small piles of usable worthwhile merchandise consisting of parkas and pants and shirts and field jackets and things of that sort.

That shortly after he arrived at the office one of the other men employed there left, leaving Sergeant Aulgur and the defendant, Meyer Schneider, alone in the office, and Meyer Schneider immediately looked up and down through there and saw these usable items and asked Sergeant Aulgur if it wasn't possible for him to make some kind of deal on these usable items, and Sergeant Aulgur advised him at that time that these commodities were to be put up for bid, and that they were being classified at the time and that he would be glad to get him the paper, and at that time the defendant, Meyer Schneider, said: "Oh, no, I think maybe you misunderstood me; I mean can't the two of us get together." Sergeant Aulgur told him there was no possibility of that and went [19] over to get the invitation for the bid.

Shortly, almost immediately thereafter Lieutenant Apperson, on an interval from his duties as

Officer of the Day, came into the salvage office, and after meeting the defendant, Meyer Schneider, they got in Lieutenant Apperson's car and drove from the salvage office down to the salvage yard where there is a building enclosed in a fence where the commodities which had been awarded and bid for and awarded to the defendant were located. And as they drove up in front of the warehouse before getting out of the car the defendant, Meyer Schneider, in talking to the Lieutenant about swapping and switching the, some of these useless items included in this scrap materials for serviceable things, and told Lieutenant Apperson that there were lots of ways that money could be made in this particular business, and that he would like very much to have some of these serviceable items which he had seen added to his particular shipment.

Lieutenant Apperson—I have slipped over one. While they were in the office before going down to the salvage yard he had asked Lieutenant Apperson if there was any opportunity to get together on these serviceable items. Lieutenant Apperson advised him that he had no authority to make what is known as a spot sale, and the Lieutenant will testify that a spot sale is where one arranges and the officer is authorized by his commanding officers to accept [20] oral bids or similar to an occasion where the successful person probably makes his bid on it and if it is acceptable in the best judgment of the officer so authorized he may accept

the money and deliver the merchandise right there rather than making regular bids. He advised the defendant, Meyer Schneider, that he had no authority to do that and that the only way those usable items could be purchased would be on invitation for bids similar to that which he put in for the scrap materials.

After that conversation they drove down to the salvage yard and began talking about swapping and switching and adding particular materials to his particular shipment. Lieutenant Apperson told him it was not possible; that he would have to bid just the same as anyone else did and he had no authority to exchange one of the articles from one to the other. At that time the defendant said: "Well, I will give you half a quid to a couple of G's, and I can take care of you; I have got it." And patted his brief case which he was carrying with him. The Lieutenant said, no, there was nothing he could do about it, let's go in and look at the articles which are in your shipment.

So the two of them got out of Lieutenant Apperson's car and went into the salvage warehouse and he took a look at the articles which he had purchased and stated to Lieutenant Apperson that he couldn't make a fish-cake out of this stuff. So immediately after that they left the warehouse. [21] Lieutenant Apperson took him back and called a taxi for him and they had made an appointment for the following day when he was to get his commodi-

ties into a freight car, and get, finish his payment and get his commodities off the Air Base.

Immediately after leaving the defendant, Meyer Schneider, Lieutenant Apperson went to the office of Special Investigation, which may be called O.S.I. when you get into the case, and reported to Captain Brynildson that the defendant, Meyer Schneider, had promised to give him from half a quid to a couple of G's as a bribe for permitting him to substitute materials and get some additional materials other than that which he legitimately purchased.

The Officers will testify they immediately called the F.B.I. office here in the city of Great Falls, and after eating lunch they came to the office here in the Federal Building and reported the occurrence as far as the defendant Meyer Schneider is concerned to Special Agent Jack Matthews of the Federal Bureau of Investigation. The stories, the statements of Mr. Apperson, Lieutenant Apperson given to Mr. Matthews were considered by Mr. Matthews, and that he very shortly after that telephoned his office, his head office in the city of Butte, and then telephoned me in the city of Billings to discuss the situation as it was advanced at that time.

After the conversation with Mr. Matthews' office and with me, Lieutenant Apperson made arrangements with Mr. Matthews to go to the legal adviser of the Army, the Judge Advocate at the Air Base, and also to Colonel Chennault, who was the Com-

manding Officer of the Air Base, to secure authority from the Army for Lieutenant Apperson to cooperate with the Federal Bureau of Investigation and the United States Attorney's office in the continuing investigation of the activities of Meyer Schneider.

After this authority was secured Mr. Matthews and Mr. Lieutenant Apperson will testify that Lieutenant Apperson was very carefully cautioned that in no particular should he encourage the defendant, Meyer Schneider, but to let him take the reins, as the saying might be, and to be the driving force and merely accede to any wish of the defendant's he might express and just let him go and see how far he would go. Lieutenant Apperson expressed a willingness to cooperate and had an appointment with the defendant, Meyer Schneider, the next day at about two o'clock. The authority was secured on the 23rd, and that afternoon about two o'clock. So about two o'clock the Lieutenant went down to the front gate of the Air Base and picked up the defendant and went to the office and Lieutenant Apperson showed him a list of surplus property which he had in the office and the defendant said: "Well that is the kind of stuff I am looking for." And they discussed the possibility of getting labor to load the [23] articles upon a freight car which had been spotted at the Air Base for the defendant, Meyer Schneider, and the Lieutenant asked Sergeant Aulgur to go over and get some additional help and that the defendant Meyer Schneider would

pay them for their services in loading the car, and also secured a truck so that the articles could be hauled from the salvage yard up to the place where the car had been spotted.

The defendant told the boys loading the car that he wanted—or somewhere along the line he took him over then to the warehouse where a lot of the surplus materials had been put in boxes and cartons and marked upon the cartons as to their contents and he looked through all of them and said: "That is fine." And he told the boys that when they were loading the car to put all those articles down in the bottom and to put all of his legally acquired articles, the rags, bundles of rags on top of these particular articles.

So the truck went to the building, 1045, I believe it is, and loaded about five or six loads of boxes and cartons of all sorts of commodities, of shoes, parkas, pants, overcoats, practically every kind of serviceable item that the Army has as far as wearing materials is concerned. And the officers will testify that the total unit cost of those particular articles to the United States was \$36,062.12. That the defendant took everything out of the warehouse except some McClellan saddles and some of the tires; [24] every usable item out of one complete warehouse and had it hauled over and put it in the freight car. And he and Lieutenant Apperson went back and forth together in the course of the afternoon in doing that and the defendant was jotting down the articles from the cartons that were

being put in. So after the car was partially loaded or almost completely loaded as far as the unlawfully acquired articles were concerned the boys asked for some coffee, the fellows loading the car, and Lieutenant Apperson went into get some coffee and left Meyer Schneider waiting in the car, and this was the first opportunity the Lieutenant had any opportunity to make any extensive contact with the members of the F.B.I. out there on the Base, and he called in and said they were about ready to go to town.

So at that time Special Agents Matthews and Leonard left the Office of Special Investigation and drove out the gate of the Air Base planning to follow the car of Lieutenant Apperson in which they believed the defendant, Meyer Schneider, would be. Lieutenant Apperson and Meyer Schneider then went back to the freight car and gave the boys the coffee and Mr. Matthews was a little too fast and found out he preceded Mr. Schneider and Lieutenant Apperson from the Base, and met them this side of the Air Base and turned around and followed them. An F.B.I. car was immediately ahead of the car in which Lieutenant Apperson and Meyer Schneider were riding in [25] and they were followed down town and parked over here near the Electric Hotel, and at that time there were several agents in that immediate vicinity, and Lieutenant Apperson's car was vacated by Lieutenant Apperson and Meyer Schneider. They walked around the corner and went into Murrill's

Bar. They were immediately followed by members of the staff of the Federal Bureau of Investigation, and when Mr. Matthews who followed a little, well, after the rest of them came there, was advised by one of the agents that Lieutenant Apperson had just gone into the men's toilet, so Mr. Matthews immediately went into the rest room and made a complete search of the person of Lieutenant Apperson to determine what money or other property or money he might have upon his person at that time. And Lieutenant Apperson left the wash room and just as he got out the door in came the defendant, Meyer Schneider, and Mr. Matthews stayed in there for a moment or two and then left. And Meyer Schneider came out shortly afterwards and after Lieutenant Apperson and Meyer Schneider had a drink or two they left and returned to Lieutenant Apperson's automobile where the defendant removed his brief case and they walked around the corner and walked down the street to the Park Hotel accompanied, not to their knowledge, accompanied by a number of the F.B.I. Agents.

They walked into the hotel and got, Meyer Schneider got his key to his room, room 340 in the Park Hotel, and he [26] and Lieutenant Apperson got on the elevator and went up to Meyer Schneider's room. After Lieutenant Apperson and Meyer Schneider got to room 340 in the Park Hotel, Meyer Schneider ordered some mix and some ice because he had some high grade scotch he wanted to give the Lieutenant and gave him, they had a

drink and he opened up his brief case and he counted out in twenty and ten dollar bills, \$1400.00, and looked over at the Lieutenant and the Lieutenant sat there, didn't say anything, he didn't smile, or he didn't do anything at all and apparently gave the impression to the defendant that he was dissatisfied with the amount of the payment so the defendant very generously added \$100.00 to it so there were fifty twenty-dollar bills and fifty ten-dollar bills, making a total of \$1500.00, and then he handed the stack of bills to the Lieutenant and the Lieutenant asked him for an envelope. The defendant took, Meyer Schneider took an envelope with his return address "M. Schneider" and his business address upon the envelope and handed it to the Lieutenant and the Lieutenant put the \$1500.00 into the envelope and sealed the envelope and put it in his pocket and left the room very shortly afterward and went down in the elevator and handed the \$1500.00 envelope to Mr. Matthews. Lieutenant Apperson was again searched and still had exactly the same property upon his person that he had when he had been searched a few minutes before going to the hotel room. And that the Agents [27] Matthews and Strahl went up the elevator immediately and knocked on the door of room 340, identified themselves as members of the Federal Bureau of Investigation and then the defendant opened the door and they came in and advised him he was under arrest for bribery of an Army officer.

Lieutenant Apperson will testify that in the course of the afternoon and the various conversations that he had with the defendant the defendant told him he operated on a very large scale in all the eastern depots; that in one particular place he had a man there who got the commodities as they came on to the depot and short-counted them and set aside materials for him so he was able to get it, and most of these commodities would never reach overseas destinations because they would go to other salvage operators who operated on that basis in the east. He said he made a practice of making bids on salvage property around at various places in the United States and after securing the bid he then put a claim into the United States Government that the commodities were not as represented to him and asking for damages, and that he had political influence in the east and that he obtained assistance in getting those claims of damages allowed, and that they had a large salvage business; they were doing a million dollars worth of business a year and they were in fine shape——

Mr. Leibowitz: Excuse me for a moment. I don't [28] want to interrupt; this narrative before the jury I think it is high prejudicial and I don't think it has anything, any bearing upon the issues of this indictment. I don't think this ought to continue on this course.

The Court: Well, his admissions are on other offenses he committed. The jury would be warned in the instructions as to that that they are not

to consider and I doubt whether he could prove other offenses that might be admitted or testified to. It all depends upon how this statement was made, under what circumstances he the defendant making admissions was cautioned or warned. You know, there are a good many things that come into the consideration there, and admissions or statements made by a defendant about what he had been doing and how he carried on his business. I don't know, it is hard to tell right at this time how that would present itself and be brought out from the lips of a witness.

Mr. Lamb: Well, if the court please, in the feeling that perhaps I may have overstepped the bounds of propriety I will apologize to court and counsel and to the jury and if any evidence of that sort is not admissible and is not admitted in evidence I, of course, will join with the court and other counsel in asking the jury to completely disregard anything I might say that is not borne out by the witness.

Mr. Leibowitz: I doubt very much whether it is competent evidence. I think the remarks here made are very [29] prejudicial, are very prejudicial to the defendant.

The Court: I don't think so. I think we can take care of that situation when we meet it.

Mr. Leibowitz: May I have an exception, your Honor?

The Court: Certainly.

Mr. Lamb: In the course of the conversa-

tions the defendant advised Lieutenant Apperson he had a permit in New York to carry a gun and that this information had been conveyed to the Federal Bureau of Investigation; and they will testify that as a course of their instructions and training that when they were advised that a man may possibly have a gun that they were to make a complete search in order to protect their own lives as well as the life of the person they are arresting; and, therefore, upon going into the room and advising the defendant he was under arrest for bribery of an Army officer and he would be arraigned as promptly as possible, a search was made to determine the presence of a gun that might be available to the defendant, and in the course of that investigation there was found some additional tens and twenty dollar bills. I don't recall the exact number, something over \$1,000.00 in the brief case of the defendant and a list totaling the, all of the commodities which had been put into the freight car found adjacent to the telephone stand, and that this item, this article, or this memorandum was seized and the defendant was advised that [30] he should put his money in the safe down in the hotel because they would be compelled to remove him from the room as he was under arrest, and he advised them he did not care to and he wanted to leave the money in the room, and they secured a receipt from him showing that nothing had been taken from him and all the articles and money and

additional tens and twenty dollar bills had been left with him.

He was then taken from the Park Hotel over to the Federal Building and placed in the Marshal's office; handcuffs weren't put on him at that time, nor was any gun displayed. The defendant was taken to the Marshal's office and the United States Commissioner was immediately contacted and came to the Federal Building, the complaint was prepared, and the United States Commissioner went in and arraigned him and set bond and the defendant was then taken to the F.B.I. office because during the course of the investigation of the room a telephone call had been, had come to the hotel room and the operator had been advised that Mr. Schneider was not at liberty to take the telephone call and therefore he would come back as soon as it was conceivably possible.

Mr. Leibowitz: May I interrupt again? I am sorry to do so.

Mr. Lamb: I am sure you are.

Mr. Leibowitz: But I think whatever Mr. Lamb is saying now has nothing to do with this present indictment. [31] I think up to this point he has stated everything that could be possibly proved under the indictment to prove the offense and I think anything that is done subsequent to the actual giving of money is immaterial and incompetent. I don't think it would be fair to the defendant if these extraneous matters enter into the case.

The Court: What do you refer to as extraneous matters?

Mr. Leibowitz: I am referring to the——

The Court: The list that had been prepared of the goods that were taken——

Mr. Leibowitz: No.

The Court: That is extraneous?

Mr. Leibowitz: No, I am not referring to that at all. I am only referring to what took place after the money was actually transferred from the defendant to Mr. Apperson. I think that is all that is required, if they can prove that, to prove the offense and what happened subsequent to that is wholly immaterial and highly prejudicial to the defendant.

Mr. Lamb: Mr. Leibowitz, is it the practice in your particular area of the United States on the admissibility of statements made by a defendant after being properly advised of his constitutional rights for that to be admissible before a jury?

Mr. Leibowitz: Mr. Lamb, I am not discussing that. I am not discussing that phase of it. [32]

The Court: Well, Mr. Leibowitz, we will see what is admissible and what isn't.

Mr. Leibowitz: May I have an exception, your Honor?

The Court: Certainly.

Q. (By Mr. Lamb): That after he had been properly arraigned and was taken to the Federal Bureau of Investigation office where all of the agents and the defendant ate and let the defendant place some phone calls to his attorney, Mr. Leibowitz, at his expense and Mr. Louis Seidman in New York City, and telephone call were received back

from them, and that after those telephone calls and these calls were placed at the defendant's request, and that after these telephone calls were completed he was advised by Mr. Matthews of the Federal Bureau of Investigation that he need not make any statement, that he was entitled to an attorney, that no promises, threats or inducements were being offered to him, and that anything he might say at that time might be used against him in a court of law.

At that time Mr. Matthews interviewed him concerning his operations in various parts of the United States and with reference to this transaction out at the United States Airbase here in Great Falls, and when Mr. Matthews asked him if he had given Lieutenant Apperson any money, he emphatically denied that he had given him any money; consequently in the course of the investigation he was again asked that question and he [33] said: "No, I didn't say that. I said I didn't give him any money for anything that transpired at the Airbase." And then he was asked if he gave Lieutenant Apperson any money with reference to any real estate transaction or anything of that sort, and he said he did not care to discuss the matter.

And in the course of the telephone conversations with New York City he was very emphatic in his instructions that, "you get that shipment out tomorrow," referring to Smalzer's merchandise, "Get that shipment out tomorrow." And that after some continuing statements that Mr. Matthews will testify to the defendant was then removed from the Federal

Bureau of Investigation office to the County Jail pending his making bond.

And each of the witnesses which the Government will bring before you on the stand will undoubtedly tell you the story far better than I have and in much more detail. And again I wish to state that, of course, I am not testifying and anything I say is merely my belief in what the witnesses will testify, but it is the actual testimony that the witnesses give themselves and the instructions of the court that you are to consider and not the remarks I make because I want to be absolutely fair and impartial to this defendant. I thank you.

The Court: Do you desire to make your statement at this time, Mr. Leibowitz? [34]

Mr. Leibowitz: I didn't want to interrupt the giving of the statements Mr. Lamb made but I think many of those statements are objectionable and prejudicial and I don't think he would be permitted to prove in the evidence——

The Court: You go ahead and make your statement and we will see about that later on.

Mr. Leibowitz: Now I want to take an objection to the statements made.

The Court: All right, you have done it.

The Court: I am asking you whether you want to make your statement to the jury at this time.

Mr. Leibowitz: Oh, no, I waive the opening.

The Court: Well, we can't start in on anything this morning.

(11:55 a.m.)

(The Court admonished the jury.)

The Court: Court is in recess until 1:30 this afternoon.

(11:57 a.m., December 13, 1949.)

(Court resumed, pursuant to recess, at 1:30 o'clock p.m., at which time the jury, defendant, and all counsel were present.)

The Court: You had finished your statement?

Mr. Lamb: Yes, your Honor.

The Court: You may call your first witness. [35]

Mr. Lamb: Lieutenant Harvey B. Apperson.

Mr. Emigh: May it please the court, at this time may the record show that the defendant moves that the rule for exclusion of witnesses be invoked.

The Court: Well, call the witnesses.

Mr. Lamb: You want them all called and sworn?

The Court: Yes, all the witnesses.

Mr. Lamb: The witnesses will stand up as I call their names: Lt. Harvey B. Apperson, Sergeant Aulgur, Captain Brynildson, Mr. Fleming, Captain Greene, Mr. Leonard, Mr. Matthews, Mr. Strahl—he seems to be absent—Mr. Spaulding, Private Walker, Mr. Zigler is not here, your Honor. Mr. Alexander, and Thompson.

Mr. Emigh: May the record show that except as to the defendant there are no witnesses in the court room in behalf of the defendant.

The Court: Not in the court room.

Mr. Emigh: If there are any anticipated, they will be notified of it, the court's rule.

The Court: They are not here now, so they will have to be excluded the same as the others. Now

the witnesses must be given accommodation in some office nearby so that they will be ready and available when they are called to take the stand. Now as to Mr. Matthews, you need him?

Mr. Lamb: I was just going to ask the court if that [36] exclusion rule would apply to an agent who is an officer of the court.

The Court: He is there to assist the District Attorney?

Mr. Lamb: Yes, your Honor.

The Court: I think the rule should not exclude him. You may stay, Mr. Matthews, and the others may——

Mr. Lamb: Do you wish them sworn now?

The Court: Yes, they may be sworn now instead of being sworn individually to save some time.

(The witnesses were duly sworn.)

The Court: That will save swearing them individually as they are called to testify. And Lieutenant Apperson, is it?

Mr. Lamb: Lieutenant Apperson is my first witness. The rest of you will have to be excused.

LT. HARVEY B. APPERSON

was called as a witness and testified as follows:

Direct Examination

By Mr. Lamb:

Q. State your name, please.

A. Harvey B. Apperson, First Lieutenant,
United States Air Force.

(Testimony of Lt. Harvey B. Apperson.)

Q. Lieutenant, how long have you been in the armed forces of the United States of America? [37]

A. Since September, 1940, with the exception of a year and a half when I was on inactive duty.

Q. A year and a half of that period you were not on active duty? A. That is right.

Q. And where are you now stationed?

A. I am stationed at a field called Bluey West One, Greenland.

Q. Will you spell that for the reporter?

A. It is spelled the way it sounds.

Q. In Greenland? A. Yes.

Q. And when were you transferred to that particular field, Lieutenant?

A. I was transferred there in April, 1949.

Q. And in the summer and fall of 1948 where were you stationed?

A. At the Great Falls Airforce Base.

Q. That is what is commonly known here in Great Falls as the Eastbase?

A. That is correct.

Q. And where is the Airforce Base to which you have just referred located with reference to the city of Great Falls?

A. East of Great Falls about four miles, I think.

Q. And when were you first transferred to the Great Falls Army Airbase?

A. I was called back to active duty from Great Falls here to that Base and I reported there the 1st of March, 1948. [38]

(Testimony of Lt. Harvey B. Apperson.)

Q. And during the year and a half that you speak of that you were not on active duty where did you reside? A. Great Falls.

Q. And are you married? A. Yes.

Q. As I understand it you married a Great Falls girl, is that correct? A. That is correct.

Q. And when were you called back to active duty at the Great Falls Airbase?

A. Well, I reported the 1st of March. I got my orders around April 15th.

Q. That was March, 1948, right? A. Yes.

Q. And in addition to your status as a commissioned officer in the United States Airforce what other capacities, what other duties were assigned to you at the Great Falls Airbase?

Mr. Eickemeyer: Just a minute. If the court please, that is objected to, incompetent and immaterial and not a proper foundation having been laid. If he is acting under any other capacity and there are written rules or regulations of appointment, I think the authority of that plan or written appointment should be here. You can't volunteer. It is not the best evidence and he cannot volunteer his capacities, particularly in this case where they are very important.

Mr. Lamb: I refer the Court to *Sabbatino vs. United States*, 298 Fed. 409, 266 U. S. 602, in which the court in [39] specifying the officer in a case of this particular nature must testify directly to the duties and show that the bribery was within the line

(Testimony of Lt. Harvey B. Apperson.)

of his official duty. However, if there is any particular question about it, I imagine I would be able to find the records of his particular duties out here at the Airbase, if that is what they wish me to do. I will have to subpoena them, however.

The Court: I think I remember the Sabbatino case, the first one you refer to. He can testify to all that, but I think I will require you to bring in some evidence of his authority, and if you will assure the court you will do that, I will let him proceed and overrule the objection for the time being.

Mr. Eickemeyer: May we have an exception, if the court please?

The Court: Yes. You don't need to take an exception. You know you are excepted any way.

Mr. Eickemeyer: May it please the court, due to conflict of authorities on that that we will be deemed to have an exception to the advance rulings of the court and save our taking an exception?

The Court: Oh, yes, sure.

The Court: Very well, go ahead and interrogate the witness, and bring any authority available and get going. [40]

Q. (By Mr. Lamb): In what other capacities were you assigned in addition to your capacity as commissioned officer, United States Air Force?

A. When I first reported I was on competitive tour where I was on probation after three months. First I was Port Control Officer, acting as person-

(Testimony of Lt. Harvey B. Apperson.)

nel officer, and Adjutant, and so forth, and after three months why I was assigned to supply and maintenance group as Guard Officer and Salvage Officer.

Q. How many other salvage officers were there at the Airbase adjacent to the Eastbase?

Mr. Eickemeyer: Now, if the court please——

A. I was the only one. And there was a Major Riffle during that time as Port Control Officer; however, when I relieved him I was the only Salvage Officer.

The Court: You were the only salvage officer when?

A. I took the duty I think in around July.

The Court: 1948? A. 1948, yes, sir.

Q. (By Mr. Lamb): How long did you carry on the duties of Base Salvage Officer at the Great Falls Airbase?

A. Up until February when I was, of 1949 when I was relieved and transferred overseas.

Q. Now, are you familiar with the, what were your duties as the Base Salvage Officer at the Great Falls Airbase from [41] the summer of 1948 through the fall of 1948?

Mr. Eickemeyer: If the court please, I assume that our objection goes to all this line of testimony?

The Court: Certainly. Certainly, it is overruled.

A. My duty was to store, segregate and handle the final disposition of all salvage and surplus materials at the East Base.

Q. Of course, many of us are unfamiliar with

(Testimony of Lt. Harvey B. Apperson.)

the procedure that is followed in the disposal of surplus property, from what department or branch of the Air Force did you procure the materials known as surplus property?

A. Well, they would be obtained from the Base Quartermaster, who is generally referred to as the Base Quartermaster.

Q. And when you received various articles or various properties from the Base Quartermaster had they been classified at that time?

A. Yes, in most cases they were classified in either useful items or scrap.

Q. And what were the technical names that were applied to the useful items?

A. You mean as an item?

Q. No, as a group, in what classification?

A. Salvage.

Q. The useful items are called salvage?

A. Yes.

Q. And the articles which are not useful are called [42] scrap?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. And accompanying the transfer of properties from the Base Quartermaster what records were there?

A. Well, there is a what we call a form 447, which is a property turn-in slip.

Q. A turn-in slip?

A. Yes.

Q. And do those turn-in slips accompany scrap property?

A. Yes.

(Testimony of Lt. Harvey B. Apperson.)

Q. You have a turn-in slip then in all of these transactions for each and every article which comes to you either as scrap or salvage property?

A. In the case where it comes from the Base Quartermaster; however, abandoned property wouldn't have a turn-in slip.

Q. Abandoned?

A. Yes. We have a certain amount of abandoned property which there is usually in ashcans and where it is useful we pick it up and get what we can back for the Government.

The Court: Gentlemen, can you hear the witness?

Mr. Eickemeyer: Not very well.

The Court: Could you speak a little louder?

A. It's turned in with turn-in slips. In the case where it is abandoned property it is very small amount of it, and where we do have abandoned property it sometimes get in ash [43] cans we pick it up and sell it as scrap to obtain as much revenue for the Government as we can.

Q. And as you secure transfer of property from the Base Quartermaster which is accompanied by a turn-in slip listing that particular shipment or transfer of property what is done with those particular records or turn-in slips that come with the transfer of the property?

A. We keep them in what we call a jacket file which is just a manila folder and we keep those

(Testimony of Lt. Harvey B. Apperson.)

and that is how we keep a record of those useful items.

Q. And in what office are those maintained?

A. They are maintained at the Base Salvage Office.

Q. And after you were appointed as the Base Salvage Officer in July, 1948, and until February, 1949, did you maintain a record of all turn-in slips and all property which came into your possession as the Base Salvage Officer? A. Yes.

Q. And what were your duties with reference to the disposal and sale and invitations to bid on scrap property?

Mr. Eickemeyer: Just a moment. If the court please, at this time we wish to renew our objection to any testimony with reference to duties on the part of this witness upon the ground and for the reason that this evidence is not the best evidence and there are provided rules and regulations for giving the authority and the duties of a Base Salvage [44] Officer and we would like to have those.

The Court: Well, if you have them; have you?

Mr. Lamb: Do you want the whole book or just the pages that pertain to his duties?

Mr. Eickemeyer: Whatever you are going to rely on.

Mr. Lamb: Will you get the book, Mr. Matthews?

The Court: I suppose you can make any places you deem important that you rely upon in connection with this special work or assignment.

(Testimony of Lt. Harvey B. Apperson.)

Q. (By Mr. Lamb): Lieutenant, I will show you a loose leaf bound book with the letters A. F. Manual 67-1 on the face of which says U S A F Supply Manual, Department of Air Force, and ask you what this exhibit Marked Plaintiff's Exhibit No. 1 is?

A. That is a manual that we are governed by.

Mr. Leibowitz: May I make my objection, your Honor. I don't think he is the proper authority to qualify that is the manual that is official and published.

The Court: Don't you think your objection is a little premature to say what it is. He hasn't even opened his mouth hardly.

A. This is all the rules and regulations we are governed by in supply activities in the Air Force in the Base level.

Q. And in conjunction with your duties as the Base Salvage Officer were you given or furnished a copy of the [45] U S A F Supply Manual to govern and control your actions as Base Salvage Officer?

A. Yes, I was.

Q. And does this manual which you now hold in your hand marked Plaintiff's Exhibit 1 contain the Air Force regulations describing your duties and actions which you should take and controlling all of your actions as the Base Salvage Officer?

A. It does.

Mr. Leibowitz: Your Honor, we would like to take a look at it and see when it was published.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Lamb: You may see it in just a moment.

The Court: Go on and make your record what it is and what it contains.

Q. And in conjunction with your taking over the office of the Base Salvage Officer did you familiarize yourself and study the particular regulations that controlled and governed all of your actions and showed your duties as the Base Salvage Officer?

A. I might bring in there that this is a, the re-written regulations. It is the same as the Air Force Technical Manual 38-505 but this is exactly the same thing, that is, publication not word by word but substantially the same.

Mr. Leibowitz: Your Honor, under those circumstances I don't think it is proper for him to testify it was the book given to him during the period he was Airbase Salvage Officer. [46]

The Court: Where did you get the book?

A. This is the, I am sure this is the book. I presume this is the same book of regulations.

Q. Or same book? What book is it?

A. Our Air Force Manual 67-1.

Q. This is the same as Air Force Manual 67-1?

A. Yes, sir.

Q. Are they both alike in respect to your duties as Salvage Officer?

A. Yes, sir, they are. This is Air Force Manual 67-1.

(Testimony of Lt. Harvey B. Apperson.)

Q. Is that the one you followed, the one you have in your hand?

A. Yes, sir, this is the one I followed. This is the latest regulation.

Q. That is the latest regulation? A. Yes.

Q. Which was the regulation at the time of this case occurred involved? A. Yes, sir.

Q. And you were following those regulations then as Salvage Officer at the Eastbase as we call it? A. Yes, sir.

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit No. 1.

Mr. Leibowitz: Well, I object to the introduction of this volume as evidence of his authority or of evidence of [47] what he is supposed to do in his duties and function on the ground there is no proof here that this very identical manual was in his hands or something like it at the time he was functioning as Airbase Salvage Officer on November 22 and 23, 1948. He says this is a rewritten book.

The Court: That is what I asked him and he said it was. He said that was the book that governed his actions and official conduct as Salvage Officer.

Mr. Leibowitz: There is no proof here that was actually the book he had.

The Court: Well, this is the same similar book; you have looked it over, haven't you?

A. Yes, sir, there are thousands printed like that.

The Court: Overrule the objection; go ahead.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Leibowitz: I will take an exception to that, please.

Q. (By Mr. Lamb): Lieutenant, referring to the index appearing on the second page of Plaintiff's Exhibit No. 1, the regulations governing your duties as Base Salvage Officer are shown in this volume commencing on page 571, is that correct?

A. That is correct.

Mr. Lamb: Ladies and gentlemen, turning to pages 571 and to succeeding pages of the volume which has been marked Plaintiff's Exhibit 1, and particularly on page 572 [48] under the title "Salvage Officer" is paragraph (1):

"The salvage officer acts for the Commanding Officer on all salvage activities at his installation. He is not accountable for property turned in for salvage but is responsible at all times for the proper storage and the disposition of salvage turned over to him. The salvage officer will exercise strict supervision over all transactions and will use due caution and diligence to prevent irregularities or opportunities for fraud and/or collusion. He is responsible for the proceeds of sales coming into his custody. He will supervise the classification, segregation, storage and disposition of salvage at his installation, maintain required records and render required reports, and keep himself thoroughly informed on markets for all salvage. He will make regular inspections of points where salvage is created and accumulated and from which it is col-

(Testimony of Lt. Harvey B. Apperson.)

lected, such as sanitary fills, dumps, incinerators, or other place where waste materials may accumulate, for the purpose of insuring proper segregation and maximum recovery. As the representative of the Commanding Officer, the salvage officer will act as a supervisor on utilization of salvaged items. To a large extent the ingenuity and the amount of effort expended by a salvage officer will determine the success of a salvage operation. The close cooperation of units at the installation is an important factor in obtaining good results in operations. [49] This can often be attained by an educational program. The maximum conservation of salvage materials by units at the installation may be stimulated by such methods as competitive salvage programs between units, waste paper drives, and close inspection and supervision of points where salvage is created or accumulated.

Mr. Lamb: On page 573, under the heading "Duties of Salvage Officers," in subparagraph (b): Base salvage officers will insure that all property turned in to salvage is accompanied by a certificate executed by an authorized person, to the effect that the property has been inspected and is subject to salvage action. (c) When, in the opinion of the salvage officer, property in salvage can be used for a specific purpose other than that originally intended, he may request that the repair shop personnel determine the suitability of property for this purpose.

(Testimony of Lt. Harvey B. Apperson.)

Again on page 573 appears the title: "Receipt and Handling." And near the bottom of the page at the right you will find a paragraph (d) "Documents effecting transfers," which reads in part: "Property turned in to the base salvage officer will be accompanied by one of the following." Sub-paragraph (1): "DA AGO Form 447 Turn-in Slip," and then it has reference of the section number.

Appearing on page 574 under the title of "Segregation of Materials: (1) Since the segregation of waste materials [50] is simplified and costs of handling are kept at a minimum if the material is separated at the source and since most salvage losses are due to failures of initial segregation by the accumulating units, sufficient suitable receptacles will be provided so that complete prescribed segregation may be accomplished."

Appearing on page 573 is a long paragraph under the title of "Disposition other than by sale," setting forth the utilization, donations, destruction. And appearing on page 577 is the paragraph covering "Disposition by Sale," which reads: "(a) Salvage that is being held for sale will be disposed of whenever the accumulation is of sufficient size to interest bidders. (b) Full publicity will be given all sales both as to material to be sold and as to awards. When sales are made on DA AGO Form 1025, "Invitation, Bid and Acceptance," copies of the form and information as to awards may be transmitted

(Testimony of Lt. Harvey B. Apperson.)

to periodicals for publicity purposes, to persons who request invitations for the purpose of notifying their clients, and to interested Government agencies."

Under subparagraph (e) "Sales will be made on the basis of adequate competitive bidding, unless otherwise authorized. All lots are to be offered in reasonable quantities that will permit all bidders, small as well as large, to compete on equal terms. Wide public notice will be given concerning such sales." The time interval between notice and [51] sale will be adequate to give all interested purchasers a fair opportunity to buy. The right to reject any or all bids will be reserved by the salvage officer. Scrap warranty is required only in negotiated sales of scrap and when flyable aircraft are sold as scrap."

Under subparagraph (1) "The following are the authorized methods of sale: (1) Competitive bidding (DA AGO Form 1025, 'Invitation, Bid, and Acceptance.') (2) Useful item lots, (3) Spot negotiation, (4) Auction, (5) Retail.

And subparagraph (m) "Sales will be made by competitive bidding, written bids, in the manner specified in paragraph 343 unless a determination has been made by the salvage officer in each instance, and approved by the commanding general, air material area, or commanding general, overseas theater air command, to the effect that it would be in the best interests of the Government to dispose of the

(Testimony of Lt. Harvey B. Apperson.)

property by negotiated sale in one of the methods authorized in paragraph 342 1, preceding or as follows: (1) Sale at nominal price for disaster relief, (2) Sale by allocation."

Appearing on page 579: "1. Processing Competitive Bid Contracts: Chart 30-6. (1) The base salvage officer will: (a) Provide the base purchasing and contracting officer with a list of materials available for sale. (b) Provide the base purchasing and contracting officer with a list, in duplicate, of prospective bidders who should be invited to bid, together [52] with any other information that will enable him properly to publicize the sale. (c) Provide the base purchasing and contracting officer with any special information necessary for inclusion in the provisions of the contract, including any conditions of sale peculiar to the items to be sold. (d) Maintain a complete and up-to-date file of prospective bidders. Upon the completeness of this file depends to a considerable extent the effectiveness of the sales phase of the salvage operation. (e) Attend the opening of bids as contemplated in paragraph 343(1)(2)(e) below. (f) Determine that bids are in compliance with existing regulations. (g) Evaluate bids, and recommend, in writing, the acceptance of those bids which in his opinion are in the best interest of the Government. His recommendation will be prepared in triplicate. The original and one copy will be forwarded to the base purchasing and contracting officer, together with

(Testimony of Lt. Harvey B. Apperson.)

the copy of the abstract of bids and the copies of the bids furnished to him by the base purchasing and contracting officer for making these recommendations. (h) Upon presentation of the statement required by paragraph 343 1(2)(o) below, release to the purchaser items listed thereon. (i) Prepare and forward to the base purchasing and contracting officer a list of items and actual quantities of materials picked up by the purchaser. This does not include items sold by retail sales.

And appearing on page 582 under the title of [53] "Spot negotiated sales," will be found the complete regulations concerning those particular sales. And under paragraph (e), "Spot negotiated sales" and contracts will be processed as follows: (1) The base salvage officer will: (a) Obtain written authorization from the area salvage officer to conduct the sale by the spot negotiation sales method. Requests will contain a complete statement of all facts relevant to the proposed sale and a statement showing that the Government will obtain a more definite tangible benefit by use of the spot negotiation method of sale than would be obtained through competitive bidding by use of DA AGO Form 1025."

"(b) Upon receipt of authority to conduct the sale by negotiation, provide the base purchasing and contracting officer with: (1) A list of material available for sale. 2. A list of prospective bidders who should be invited to bid. 3. Any special information necessary for inclusion in the provisions

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of the contract, including any conditions of sale peculiar to the items to be sold. (c) Evaluate bids received from the base purchasing and contracting officer and recommend to him, in writing, the acceptance of those bids which in his opinion are in the best interests of the Government. (d) Accomplish as necessary the number of copies required to comply with procedures for processing competitive bid contracts.”

Appearing on page 584 under the title “Payments”: [54] “No property sold will be delivered or shipped to the buyer until the amount due the United States therefor has been paid, except as authorized by the commanding general, air material area, or the commanding general overseas theater air command having jurisdiction.”

And under the paragraph, page 584, marked “Weight, Count and Inspection”: “To protect the interests of the Government and to prevent errors, fraud, or theft, all salvage property sold will be inspected by the salvage officer or his representative at the time of delivery or shipment to purchasers. Salvage officers will be on the alert to prevent dishonest practices in weighing property. Scales will be periodically examined.”

And on page 585 under “Coordination of Sales”: “b. (2) A salvage officer or purchasing and contracting officer for the sale of salvage at one of the installations who will be responsible for the sale of the specified items of salvage at the installations so

(Testimony of Lt. Harvey B. Apperson.)

designated. c. Salvage officers at the designated installations will be responsible for the classification, segregation, storage, and preparation for sale of all salvage at their respective installations.”

Appearing on page 586 under the title “Records”:
“a. Base salvage officers are responsible but not accountable for property turned over to them for disposition. Base salvage officers are required to keep records that will enable [55] the inspecting officer and the property auditor to trace the property received from the date of receipt to final disposition. Such records consisting of a voucher register, voucher file, and loose-leaf system, will be maintained to show a continuous and complete record of salvage received, on hand, and disposed of. Salvage records will be maintained on separate sheets for each item, or group of items as required, with the title of the sheet showing both the item number and the description of the item as set forth in the Standard Classification List in Supplement 1 to this section. (b) Base salvage officers are not required to maintain stock record accounts for small lots turned over to them but are required to keep records that will enable the inspecting officer and property auditor to trace the property received from the date of receipt to final disposition. Such records marked “small lots” will be maintained in loose-leaf system or jacket files containing copies of turn-in slips or other transfer documents and documents showing final disposition.”

(Testimony of Lt. Harvey B. Apperson.)

Q. (By Mr. Lamb): Without reading on at great length, Lieutenant Apperson, the paragraphs I read, do they substantially govern your duties as you understood them at the Air Base as the base salvage officer? A. Yes.

Q. And were you familiar with all of those regulations [56] in November, 1948? A. Yes.

Mr. Eickemeyer: May we have that book for a moment to look at it?

Mr. Lamb: Yes, sure; it is in evidence. We might put these in right now so they won't get lost.

Q. Lieutenant, in August of 1948, was there a surplus of scrap materials in your possession and custody and under your control as the base salvage officer?

A. Yes, there was some stuff, quite a bit of it there; not any more than usual, I would say.

Q. And was there any of this material that had been classified as scrap? A. Yes.

Q. And in your performance of your duties and in conjunction with the purchasing and contracting officer were invitations to bid on this particular scrap material mailed out to prospective bidders?

A. Yes, in August and September.

Q. August and September? A. Yes.

Q. And was one of the bidders the defendant, Meyer Schneider? A. Yes.

Q. And from your own personal knowledge do you know what property the defendant, Meyer

(Testimony of Lt. Harvey B. Apperson.)

Schneider, sent in his bid after receipt of an invitation to bid?

A. Yes, he bid on the scrap wool and scrap cotton rags.

Q. Now, were the scrap wool and scrap cotton separate [57] items in the invitation for bid?

A. Yes.

Q. And did he bid separately for the two items?

A. Yes.

Q. Did he bid on any of the other items?

A. No, not to my knowledge.

Q. And was Meyer Schneider, the defendant, the successful bidder or the highest bidder for those particular two items? A. Yes, quite a bit.

Q. Were there other—as I understand it there were other bidders for these particular items?

A. Yes, as I recall there were three other bidders.

Q. But his was away above the other bidders?

A. Yes, quite a bit above.

Q. And upon receipt of his bid what, if anything, did you and the contracting and purchasing officer do?

A. We decided that that was the highest bid and that it would be awarded to him.

Q. And what is the procedure then that is followed when you and the base contracting and purchasing officer——

Mr. Leibowitz: Your Honor, I think at this point we should have the contract itself, which

(Testimony of Lt. Harvey B. Apperson.)

stipulates as to the terms, and so the record may show, may I say mere schedule of the bidders on this merchandise is all.

Mr. Lamb: Are you testifying now?

Mr. Leibowitz: No, I just want to put the contract in is all; that is the best proof. [58]

Mr. Lamb: I merely asked Lieutenant Apperson what they did.

Q. What did you and the base contracting and purchasing officer do?

A. We opened them and found that his was the highest and concurred and then he, as was the practice, sent me a memorandum to the effect that that was the highest, and I, of course, indicated by concurrence by an endorsement that we award it to Schneider.

Q. I will show you an exhibit marked Plaintiff's Exhibit No. 2, and ask you if you know whether this is an exact and true copy of the original contract submitted by the defendant, Meyer Schneider?

A. This is a certified true copy of the bid or the invitation sent to Schneider.

Q. Included herein is the invitation to bid, the bid, and the Government's acceptance, is that correct?

A. That is correct.

Mr. Lamb: I will offer it now. If you have any objection, I will lay a further foundation.

Mr. Leibowitz: Well, simply it does not say the bidder was Meyer Schneider; that it was M. Schneider.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Lamb: You make your objection if you want to.

Mr. Leibowitz: I have no objection to the introduction of this contract in evidence, but merely for the [59] record to say M. Schneider is not Meyer Schneider.

Mr. Lamb: I object to Mr. Leibowitz testifying. If they want to put the witness on that is fine. I object to your getting up and testifying to a lot of things, and the contract reads on its face, and you can bring out to the jury anything you wish by cross-examination or by your own witnesses.

The Court: Do you object to the contract?

Mr. Leibowitz: I don't object to the contract itself.

The Court: Very well, it may be received in evidence.

(Whereupon, said Plaintiff's Exhibit No. 2, being a contract, offered and received in evidence, is a part of this record.)

Mr. Lamb: I will read the material portion. There is a lot of fine print. Is there any objection to the reporter not taking it down?

Mr. Leibowitz: I don't.

Mr. Eickemeyer: It may be considered as read and used by either side; may it be stipulated?

Mr. Lamb: Yes, as far as I am concerned, without the court reporter taking down the complete reading if that is satisfactory to the court.

(Testimony of Lt. Harvey B. Apperson.)

The Court: It is and the counsel seem to be satisfied.

Mr. Lamb: I will read the material portions.

(Mr. Lamb read Plaintiff's Exhibit No. 2.)

Direct Examination

(Continued)

By Mr. Lamb:

Q. After the acceptance of the bid of which Exhibit 2 is a copy what was your first connection with the defendant, Meyer Schneider?

A. My first personal contact with him was when, on November 15th a telephone call came in to Private Walker, who was then a clerk in my office. I found out that it was a call from New York and presumed that it was from Schneider and I wanted to talk to him and tell him to remove this stuff and I took the telephone away from Walker and explained to him, explained to Schneider that since I was the Salvage Officer any transactions would have to be handled through me.

Q. How did you know you were talking with the defendant Meyer Schneider?

A. He said he was Meyer Schneider.

Q. And what was the conversation which you and the defendant Meyer Schneider had at that time by long distance telephone?

A. Well, I explained to Schneider that under the terms of the contract he was supposed to remove the material he had bought from the Base within

(Testimony of Lt. Harvey B. Apperson.)

ten days and pointed out that section of the paragraph and explained to him he was a good bit overdue and we needed the space and he would have to [61] pick up the material as soon as possible because we needed the storage and warehouse space. Schneider then explained to me that, I can't remember just exactly what he gave as a reason for not picking it up, but he did explain he would be out to Montana the following Monday.

Q. Do you recall what date it was he was to appear here in Montana?

A. I think it was, no, the 16th or the 17th.

Q. It was along sometime about the middle of November, 1948?

A. That is right, about the middle of November, 1948.

Q. What date then did—or did you have any further conversation with Meyer Schneider?

A. Yes. I think he was supposed to arrive the following Monday. The following Tuesday he hadn't got to Great Falls so I called him long distance collect and explained to him that if he did not come out and pick up and remove the material I would cancel his contract and I would forward to him by registered mail a notice that the contract had been cancelled and that we would also make, that he would forfeit his deposit and the necessary charges to be made against him. In other words, what it would cost the Government to dispose of the material. He stated he would arrive in Montana on

(Testimony of Lt. Harvey B. Apperson.)

the 21st, I think, of November, 1948; that would be on a Sunday. I explained to him that I had other duties at the time and [62] asked him if he would arrive Monday or that I would talk with him Monday; that would be November 22nd, 1948. He said he would come out and he had other things to talk to me about.

Q. That he had other things to talk to you about? A. Yes.

Q. Were there any other calls to the office during that period from New York City?

A. On the first telephone call the afternoon of the 15th of November, 1948, a long distance telephone call came to my office to Private Walker, I think, or to Walker, that would be the telephone operator expressed it herself, and I took the telephone and said this was Lieutenant Apperson, the Salvage Officer; the party on the other end wouldn't talk to me.

Q. So there was no—how long was that after you had taken the phone away from Walker and had talked with the Defendant Meyer Schneider?

A. Oh, an hour or hour and a half.

Q. And then did the defendant Meyer Schneider come to Great Falls on the 21st or 23rd of November, 1948, and contact you?

A. I had a telephone call from him on the morning of the 22nd of November, 1948, to arrange a meeting. I explained to him that I was Officer of the Day and had other duties and could not meet him

(Testimony of Lt. Harvey B. Apperson.)

until approximately ten or ten thirty or [63] somewhere thereabouts.

Q. And was there any other conversation with him over the phone other than making an appointment for a subsequent meeting at the Airbase?

A. Not that I remember of, no.

Q. And what at the time if anything was said—did you wait for him to come to the Airbase?

A. I told him that I would meet him at the main gate between ten and ten thirty.

Q. And did you meet him at the front gate between ten and ten thirty on November 22, 1948?

A. No, I had other duties being Officer of the Day so I sent my assistant, Sergeant Aulgur to meet him at the gate.

Q. Well then about when was it that you first saw and met with Meyer Schneider, the defendant?

A. I met him in my office approximately ten thirty on the 22nd.

Q. And who else was present at that time?

A. Sergeant Raymond Aulgur and Tech/Sergeant Christianson were both in my office when I arrived and Schneider was in my office.

Q. And did you meet Meyer Schneider who sits here at the table now? A. Yes.

Q. And that is the man that came to the airbase? A. That is Meyer Schneider. [64]

Q. And then on the morning of November 22, 1948, was there surplus usable property visible to anyone in the office at that time?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes, we had material stacked all through the building. We had been recently moved and due to Virtuals Operation and the office space was awfully small and we had to move to the smallest place possible. It was visible.

Q. And were they all piled up in one pile or what was the condition?

A. Mattresses in a pile, shirts in another pile, trousers in another, boots in another, and various other items of equipment, broken tools, and so forth in another; quite a few piles.

Q. Were any of those piles extending from the back of the warehouse through and were any of those piles in the office itself?

A. Oh, yes, I could touch them from my desk.

Q. And they were within sight of the defendant, Meyer Schneider, when you first came into the office?

A. They were.

Q. Between ten and ten thirty on November 22, 1948, is that correct?

A. They were.

Q. And what conversation did you have with the defendant Meyer Schneider on the morning of November 22, 1948, when you first met him? [65]

A. Well I introduced myself and he said he was Meyer Schneider. We walked back into the back of the warehouse. First he asked me if I had any other merchandise other than what he had bought. Well we walked back into the rear part of the warehouse and I showed him the piles of shirts, trousers

(Testimony of Lt. Harvey B. Apperson.)

and so forth, and then he asked how he might get hold of some of them.

Q. And what did you tell him?

A. I explained to him I had no authority to make spot negotiations or retail sales and the only way he could obtain them would be to submit his bid by invitation the same as anybody else and that he would have to bid and be in competition with anybody else.

Q. Now for the benefit of the court and the jury what is a spot sale as you designated it?

A. Well a spot sale is where I would be given authority by the Commanding General of the Air Material Command to decree a sale to an individual where he would pay me for the material, take the material and haul it away, and I would, of course, turn in the money to the Finance Office.

Q. And you had explained at that time to Meyer Schneider that you did not have that necessary authority?

A. Very carefully explained it to him I had no such authority.

Q. All right, what further conversation did you have [66] with him?

A. Then he wanted to know if maybe we could swap or get together. I then didn't commit myself much one way or the other. Then I asked him if he would like to see the stuff he had purchased.

Q. Well what did you and he do?

A. We drove from that office to the salvage yard which is where we keep all scrap material.

(Testimony of Lt. Harvey B. Apperson.)

Q. As I understand it for the matter of location the salvage yard is at the far east end of the Air-base and the salvage office nearly at the west side of the Base as far as the buildings are concerned?

A. That is right.

Q. And you drove from the Base salvage office then over to the salvage yard?

A. That is right.

Q. Where were the materials which Meyer Schneider had secured by way of the written bid?

A. They were located in a warehouse inside the salvage yard.

Q. In other words, a fenced area with building inside?

A. Fence area, yes, with building inside.

Q. Then as I understand it you and Meyer Schneider rode in your car to the salvage yard adjacent to the building where his property was located?

A. That is right.

Q. All right, did you at that time have any further [67] conversation with the defendant Meyer Schneider?

A. Yes, he wanted to get together with me or trade some of the scrap that he had legitimately purchased; he wanted me to substitute some of the useful items for this scrap, and he went on to say that he would take any amount and that he would give me, said he would give me half a quid to a couple Gs, and he further said "I have got the money right here" and slapped his brief case to indicate he had a couple Gs to take care of me.

(Testimony of Lt. Harvey B. Apperson.)

Q. And what did you tell him?

A. I indicated then I didn't want to have any part of it. I said more or less "Let's go and see what stuff you have got."

Q. Then was there any further conversation in the car before you got out and went into the warehouse?

A. No. He did say something about this is not the only way you can, there was quite a bit of money to be made on this sort of business, in that fashion.

Q. Then what did he and you do?

A. We got out and went into the warehouse and I showed him the scrap cotton, cotton rags and so forth, and he looked at the stuff and more or less shrugged and said "I can't make a fishcake on this sort of stuff."

Q. All right, after Meyer Schneider said he decided he couldn't make a fishcake on that kind of stuff, where did you go? [68]

A. We drove from the salvage yard to the coffee shop to the rear of the hangars or other end of the Base.

Q. On the west end of the Base somewhere near the Base salvage office?

A. No, it is entirely in the opposite direction.

Q. And did you go into the coffee shop with him? him?

A. Yes, I drove my car to the coffee shop.

(Testimony of Lt. Harvey B. Apperson.)

Q. Did you have any further conversation with him at that time?

A. Well on the way up there to that coffee shop he said that a deal like that would be easy enough to cover. He acted that he knew all about how records were kept and had quite a knowledge of the Quartermaster operations and said a deal like that would be easy enough to cover.

Q. Then after you were at the coffee shop then what did you and he do?

A. We went into the coffee shop and got a cup of coffee and at that time Schneider began to tell me about how he operated at other bases and that he explained to me he operated quite a bit at a large depot down south and very carefully avoided telling me where that depot was. He said that he had dealt quite often through salvage agencies and at that time I think he said something about a cousin or somebody that had been in the Quartermaster Corps during the war, that wasn't material the conversation at the time. I [69] told him, well, I was very non-committal, I didn't say one way or another. By that time it was about 11:15 or between 11:30, and I had been Officer of the Day and up the night before and I went into the commercial transportation office where I could get a telephone and call a taxicab for Schneider.

Q. Well did Meyer Schneider leave the Base then as soon as his taxicab arrived?

A. Yes, he left, and I *asked* over to the Officer

(Testimony of Lt. Harvey B. Apperson.)

of Special Investigation and reported to him that an attempt had been made to bribe me.

Q. And that was immediately following the time that Meyer Schneider left? A. Yes.

Q. All right, after making this report to the Office of Special Investigation that an attempt had been made to bribe you, who was the officer you reported that to?

A. I reported it to Captain Brynildson.

Q. And what did you and Captain Brynildson do?

A. Well Captain Brynildson called Mr. Jack Matthews of the F.B.I., who made an appointment with us about two o'clock that afternoon, one thirty or two o'clock.

Q. Well then what did you and Captain Brynildson do?

A. We came down—we had lunch at the Officers' Club and then came down town and met Mr. Matthews.

Q. And where did you meet Mr. Matthews? [70]

A. In the Federal Building here in the F.B.I. office.

Q. And what took place at that time?

A. We explained and I reiterated—

Mr. Lebowitz: I object to what took place in the absence of the defendant between Mr. Apperson and the F.B.I. Agent.

Mr. Lamb: I will withdraw the question, your Honor.

(Testimony of Lt. Harvey B. Apperson.)

Q. All right, after you met with Mr. Matthews and Captain Brynildson in the F.B.I. office what did you do?

A. I indicated my willingness to cooperate in any way I could and then Mr. Matthews told me——

Mr. Lebowitz: I object to that——

Mr. Lamb: You can't testify to what Mr. Matthews told you.

The Court: No conversation without the defendant present.

Q. (By Mr. Lamb): Then what did you do after that?

A. I went home and went to bed after that.

Q. You had been up all night? A. Yes.

Q. Then the next day what did you do? That would be November 23, 1948, in the morning?

A. I went to work as usual and worked from about eight to ten when Mr. Matthews contacted me again.

Q. And after Mr. Matthews had contacted you what did [71] you do and Mr. Matthews do, if anything?

A. We went to see Colonel Chennault, who was the Base Commander, in company with a Colonel Abdalah, who was the Staff Judge Advocate, that is the legal. We went to Colonel Chennault and I explained to the Commander just what had happened and ask him his permission to cooperate with the F.B.I.?

(Testimony of Lt. Harvey B. Apperson.)

Q. And did you secure that permission?

A. Yes, he signed it then in writing directing me to cooperate in any manner and do anything they told me within reason, of course.

Q. And after consultation with the legal adviser or the Airbase and the Commanding Officer, Colonel Chennault and Mr. Matthews, what did you do?

A. Well I had previously arranged an appointment with Schneider at around two that afternoon.

Q. And that was on the afternoon of November 23, 1948?

A. That is right.

Q. Did you meet with the defendant Meyer Schneider at about two o'clock on the afternoon of November 23, 1948?

A. Yes, I first met Meyer Schneider up at the main gate in my automobile and drove him to the salvage office.

Q. That is the same United States Air Force Base adjacent to the city of Great Falls?

A. Yes, that is correct. [72]

Q. All right, did you have any conversation with the defendant en route from the gate to the Base salvage office?

A. I don't remember any conversation at all.

Q. And when you arrived at the Base Salvage office who was there?

A. Sergeant Christianson and Sergeant Aulgur.

Q. And where were they with reference to where you and Meyer Schneider was?

A. I remember Sergeant Aulgur was on the right about ten feet away behind a desk; I don't remem-

(Testimony of Lt. Harvey B. Apperson.)

ber where Sergeant Christianson was; I am sure he was in the office though.

Q. Was the office a large office or rather small?

A. No, it is rather small.

Q. Mainly occupied by desks and filing cabinets and narrow aisles, is that correct?

A. Narrow aisles.

Q. Was it possible for anyone sitting at any of the desks in the office to hear normal conversation carried on at any of the other places?

A. Oh, I think you could hear anything that was said, it was that small.

Q. All right, then what took place?

A. I pitched a jacket file in front of Schneider; that jacket file contained a complete list of the useful items, useful salvage items that we have in storage as salvage at [73] that time.

Q. Did you say anything at that time?

A. No.

Q. What did Schneider do when you laid the jacket file on the desk?

A. He opened it. I did indicate to him or point to the total value, that is the original purchase price to the Government. I pointed to that. Schneider shook his head and then shook his head and indicated that was accepted.

Q. And was there any, did he say anything at that time?

A. No, I can't remember that he did say anything.

(Testimony of Lt. Harvey B. Apperson.)

Q. Did you say anything at that time?

A. No.

Q. All right, then what transpired?

A. I explained to Schneider then that he would have to pay my boys or my enlisted men for loading the stuff and it would have to be loaded after hours because as the terms of the contract he is supposed to move the materials as is where is.

Q. What do you mean by after hours?

A. In other words, we work enlisted men from eight to five and after five, of course, that is their time so it is more or less overtime and I explained to him that he would have to pay them. However, I did make an exception then and started them to work a little earlier. [74]

The Court: We will take a recess for fifteen minutes.

(2:55 p.m.)

(The court resumed, pursuant to recess, at 3:10 o'clock p.m., at which time the jury, defendant and all of the counsel were present.)

(Lt. Harvey B. Apperson resumed the stand.)

The Court: Proceed:

Q. (By Mr. Lamb): Lieutenant Apperson, what was the condition out at the Airbase on November 23, 1948, as far as available labor was concerned for civilians as far as to load freight cars on the Airbase with property they had purchased?

A. Well, there was no labor and the only way Schneider would have been able to get labor would

(Testimony of Lt. Harvey B. Apperson.)

be to come down town and negotiate it, and at that time labor was pretty hard to get and I told him my boys would load the stuff and he would have to pay them to do so because it would be after duty hours and part of it would be after-duty hours.

Q. And was it part of the duties of the men in your office or in your command to load material for civilians who might purchase property?

A. No.

Q. Any services then rendered by any military personnel would be entirely voluntary upon their part? [75]

A. That is right and Schnieder would have had to have paid them for that labor.

Q. And you advised him of that situation?

A. That is correct.

Q. Discussed between the two of you?

A. It was.

Q. And was that arrangement satisfactory with him?

A. Yes, he said that would be satisfactory to him and turned to Sergeant Aulgur and told him to get the necessary labor and the necessary people.

Q. All right, then what was done, what took place?

A. We left the salvage office and went to warehouse No. 1045; that is where I had quite a large amount of salvage clothing. Sergeant Aulgur in the meantime had obtained a truck. Schnieder said to Sergeant Aulgur to be sure and load the

(Testimony of Lt. Harvey B. Apperson.)

stuff that we got out of 1045 in the bottom of the freight car and then load the rags on top. We went to the freight car and started loading the clothing which was put up in cartons into this truck to haul to the freight car.

Q. Now, as I understand it what class of material was in warehouse No. 1045 where they started loading the materials from?

A. They were all useful items.

Q. And can you recall now of what they consisted?

A. There were parkas, obsolete parkas, shirts, trousers, [76] what they call blucher boots, a few McClellan saddles, but mostly shirts, trousers, and also R.O.T.C. blouses not useful to the Air Force because they had blue lapels and olive drab bodies.

Q. Field jackets?

A. Field jackets; and all kinds of things like that.

Q. And how much of that, those useful articles were stored there, was there a warehouse full or half full?

A. Oh, it was almost a warehouse full.

Q. And when the truck had been brought to the warehouse 1045 by Sergeant Aulgur and the other men whom Schneider had employed, what did Schneider do while the materials were being loaded upon the trucks, if anything?

A. Well, he more or less supervised the loading and noted on a piece of paper how many shirts were in each carton and so forth.

(Testimony of Lt. Harvey B. Apperson.)

Q. And each carton or bundle or box contained a notation thereon of the number of articles in it?

A. That is right.

Q. And as to the first load the defendant Meyer Schneider stood there and listed the articles that had been put on the truck?

A. That is true.

Q. When the truck was loaded then what did you and Meyer Schneider do, if anything? [77]

A. We followed the truck down to the freight car and watched the men unload it into the freight car.

Q. And then after the first load was put into the car then what did you and Meyer Schneider do?

A. It was either the first or the second load I received a call from the Air Provost Marshal to call the Provost Marshal and it turned out that telephone call; they were wondering what to do with some abandoned property.

Q. It had nothing to do with this particular transaction? A. It had nothing to do.

Q. When you received the call from the Provost Marshal office what did Meyer Schneider do?

A. To the best of my knowledge he stayed there and kept note of everything that went on the truck.

Q. Then did you rejoin him? A. Yes.

Q. And approximately how many loads of material were taken from warehouse 1045 and put into the freight car there at the Airbase?

(Testimony of Lt. Harvey B. Apperson.)

A. I would say about five or six but I am not exactly sure.

Q. About what time in the afternoon did the loading start?

A. Between two-thirty and three-thirty, somewhere around there. [78]

Q. And about how many soldiers were engaged in the loading and unloading of the material?

A. About five.

Q. And during the course of the afternoon then with the exception of the time you received the call from the Provost Marshal's office and left him for a few minutes were you together with him all of the time on the trips back and forth from the warehouse to the car? A. Yes, I was.

Q. And during that time did you have any conversations with the defendant Meyer Schneider?

A. Not that I can remember exactly. Nothing of any importance; he was awfully interested in chino shirts, that was about the main thing.

Q. At that time did he discuss with you the extent of his business in New York City?

A. No, that wasn't until later.

Q. And did he have any discussion with you about further activities at other depots?

Mr. Leibowitz: I object to it as wholly irrelevant and immaterial and incompetent.

The Court: I think so. It had nothing to do with this transaction. I will sustain the objection.

Q. How long did the loading go on that you and

(Testimony of Lt. Harvey B. Apperson.)

Meyer Schneider continued to watch and note the items? [79]

A. Oh, about four thirty.

Mr. Leibowitz: I object to it unless it is responsive to a question. I don't know; it did not seem as if it is going to be responsive to that question anyway.

The Court: Well what was the question, and what did the Lieutenant understand by it?

(Question read.)

Q. How long did the loading go on that you and Meyer Schneider continued to watch and note the items?

A. Until about six o'clock, with the exception of another time that I was away that we left the loading that I just recalled.

Q. And did Meyer Schneider go with you when you left the loading on this second occasion?

A. That is right. We went to the purchasing and contract office where he paid for the scrap that he had legitimately purchased.

Q. And who was the purchasing and contracting officer at the Air base at that time?

A. Captain Greene, who was then a First Lieutenant.

Q. And did you accompany Mr. Schneider to the purchasing and contracting office while he paid for the articles which he had legitimately purchased?

A. Yes, I did.

Q. And were you there with him during all that transaction? [80]

(Testimony of Lt. Harvey B. Apperson.)

A. During the complete time, yes.

Q. And did he at that time offer to pay to Captain Melvin Greene, who was then Lieutenant Greene and the purchasing and contracting officer at the Airbase for the materials which had been removed from the building 1045 and was being placed in the freight car? A. No.

Q. And did he at that time or at any other time to your personal knowledge pay or offer to pay to the purchasing and contracting officer for the materials which were taken out of building 1045?

A. No.

Q. On purchases of surplus and salvage property at the Great Falls Airbase in November, 1948, to whom were all payments to be made?

A. To the purchasing and contracting officer.

Q. Did you have any authority at any time during the month of November, 1948, to accept money payments for any surplus scrap or salvage property of the United States Government that would be removed from the Air base or the control assumed by any purchaser or any other person?

A. I did have authority to sell scrap lumber, but specifically scrap lumber and only scrap lumber.

Q. Did you have any authority at any time during the month of November, 1948, to accept money in payment of any [81] scrap or surplus property of the United States Government, the property consisting of overcoats, parkas, field jackets, blucher boots, or any clothing item? A. No.

(Testimony of Lt. Harvey B. Apperson.)

Q. To whom were all payments required to be made for any such items during that month?

A. To the purchasing and contracting officer.

Q. Who was then Lieutenant Greene?

A. That is right, it was then Lieutenant Greene.

Q. While at the purchasing and contracting office what did the defendant Meyer Schneider do?

A. He went into his brief case and got out certified checks payable to the Treasurer of the United States, if I remember correctly, and also he asked for, he asked how the bids were going and what return were we getting and somebody in the purchasing and contracting office gave him a copy of an abstracted bid from a previous sale which Schneider copied; it also mentioned who the bidders were and pertinent information.

Q. Did the defendant in your presence make an abstract of the bids that had been upon all of the items which had been offered on the invitation to bid?

A. He made notations of an invitation to bid. I don't know if it was this invitation or not but he did make notes on a paper and copied the amount they had bid and the name of [82] bidder.

Q. I will show you a slip of paper marked Plaintiff's Exhibit 3 and ask you if that is the abstract of the, which was prepared by the defendant, Meyer Schneider, in the office of the purchasing and contracting officer when making payment for the commodities which he had legitimately purchased?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes, this is it.

Q. And referring to the reverse side of this particular Plaintiff's Exhibit 3 were any of the items placed which you now find on the back of that placed at that time by the defendant, Meyer Schneider, in your presence?

A. They weren't placed on this paper that I know of; however this looks as though it is a list of stuff we loaded.

Q. Did you see him place that on there at that time? A. No.

Q. After the defendant had copied the abstract of the various bids at the purchasing and contracting office what did he and you do?

A. We went back to building 1045 where they were still loading, finished up that and then went to the salvage yards.

Q. At the time you went to building 1045 and finished the loading what commodities were left if any, in the building at that time?

Mr. Leibowitz: Which building was that?

Mr. Lamb: 1045. [83]

A. Some aircraft tires, McClellan saddles and quite a number of aircraft instruments, oil pressure gauges and so forth.

Q. Did the defendant leave any clothing or shoes or anything of that sort in the building?

A. No.

Q. Everything had been removed with the exception of the McClellan saddles and some tires?

(Testimony of Lt. Harvey B. Apperson.)

A. That is right.

Q. And some other aircraft material?

A. In another part of the building there were some personal items belonging to a Major that was stored there and those were left.

Q. But all of the surplus clothing material had been moved out? A. That is correct.

Q. Lieutenant, from your records do you know the unit or the cost to the United States Government of the material which were moved from building 1045 and put into the freight car in question?

A. \$36,000 and some dollars. I don't know exactly but I know it is about \$36,000, \$36,050, or sixty.

Q. And that was the cost of those items?

A. To the Government.

Q. And as I understand it, after building 1045 was [84] emptied then you went to the salvage yard with the defendant, Meyer Schneider?

A. That is correct.

Q. And what took place there?

A. We supervised two loads of scrap and during the course of this Schneider told me of, well, he was interested in shoes and wished he had to bid on those shoes; also told me he had a very large market for any useful items in the way of uniforms, shoes and so forth in Berscha, Syria. He also explained to me, the gist of the conversation was that the aircraft that were stored in New Mexico——

Mr. Leibowitz: I object to the answer. I object to the question on the ground it is wholly immaterial

(Testimony of Lt. Harvey B. Apperson.)

to the matters in the indictment and which cannot prove any offense in the indictment at all, and it was done after the act of the loading of the merchandise; I think the thing is over.

Mr. Lamb: The question, your Honor, was what took place in the building in the salvage yard.

The Court: I think any conversation between them that refers some other matter has no connection with this is not relative to this case, this charge here. I will sustain the objection as to that. What is it, something in New Orleans?

Mr. Lamb: I agree with you as far as the airplanes is concerned. Much of this evidence of the activities in other Army Depots is being offered for the purpose of showing that [85] the defendant well knew the transactions.

The Court: Well you have already shown his familiarity in this business that he is engaged in; he has dealt with other salvage bases and stations but when it comes to anything that hasn't any bearing on or legal connection and unconnected entirely with this transaction, and Mr. Leibowitz's objection to that is sustained.

Mr. Leibowitz: May I have the answer stricken out?

The Court: Yes, as far as New Orleans or anything going on down there; was it New Orleans?

A. No, sir, New Mexico.

The Court: All right, it will apply to New Mexico.

Mr. Lamb: How many loads of scrap material

(Testimony of Lt. Harvey B. Apperson.)

Meyer Schneider legitimately purchased were taken from the building to the freight car during the time you were there?

A. Approximately two; however, there were quite a few loads left when we left.

Q. About how many thousand pounds did that legitimate purchase consist of? A. About 16.

Q. Then how long did you and Meyer Schneider stay there supervising the loading of the rags if we may call them that?

A. Oh, I would say half an hour or forty-five minutes.

Q. That was after you returned from the purchasing and contracting office? [86]

A. Maybe an hour and a half, I am not just exactly sure.

Q. Then what did you and Meyer Schneider do then?

A. We left the, well the boys, the men had expressed the desire for some coffee so I obtained a thermos bottle and went to the mess hall with Schneider and left him in the car and went into the mess hall and got this thermos jug full of coffee and called the F. B. I. to keep an eye on me, and then we left there and went back to the salvage yard and gave them the coffee, and drove from there to the main gate, down Second Avenue, north to Third Street, parked on Third Street just on the other side of Central Avenue and went into Murrill's Bar.

Q. The defendant was with you then on all of

(Testimony of Lt. Harvey B. Apperson.)

this trip from the Air Base down to across, down Second Avenue and across Central Avenue where you parked near Murrill's Bar?

A. That is right.

Q. And had the car been completely loaded at that time? A. No.

Q. And where had the rags, the legitimate purchase been put with reference to the, all of the boxes and cartons which had been taken out of building 1045 in the freight car?

A. They were placed in the freight car on top of those cartons.

Q. And when you went into Murrill's Bar what took place there?

A. I sat with Schneider and had a couple of drinks. I [87] left Schneider and went into the men's room and shortly after I had gotten into the men's room Mr. Matthews of the F. B. I. came in and searched me and after that search I went back out and met Schneider on the way in and went and sat down and waited for him.

Q. And then did the defendant, Meyer Schneider, come out of the men's room in Murrill's Bar and rejoin you? A. Yes.

Q. After he rejoined you what did you and the defendant do?

A. We came out of Murrill's and went back to my automobile where he got his brief case.

Q. Where the defendant got his brief case?

A. Yes.

(Testimony of Lt. Harvey B. Apperson.)

Q. Had he had this brief case with him during the course of the day?

A. Yes, I don't think I saw him without his brief case.

Q. And after the defendant got his brief case out of your car then what did you and he do?

A. We walked down Central Avenue to the Park Hotel.

Q. And by the way during the time you were in Murrill's Bar was your automobile locked or unlocked? A. It was locked.

Q. You walked down the street to the Park Hotel and when you got to the Park Hotel what did you and the defendant do [88] if anything?

A. We went up to his room. I expressed the desire for another drink and he said he had some good scotch so we went to his room.

Q. To what room in the Park Hotel in Great Falls, Montana, did you and the defendant go?

A. Room 340.

Q. 340? A. Yes.

Q. And when you got in room 340 with the defendant, Meyer Schneider, will you just tell us what took place?

A. We sat down and he called room service and asked for some ice and soda. He started talking about a claim he had submitted through——

Mr. Leibowitz: I object to that, your Honor. I don't think it has any relevancy to the case at all.

(Testimony of Lt. Harvey B. Apperson.)

The Court: I don't know. I have no idea myself. Let's find out more about it.

A. He started talking then about a claim he had talked about at the salvage yard.

The Court: What claim, Lieutenant? Did that relate to this transaction, purchase out here? What did it relate to?

A. It related to a claim with War Assets that he had submitted with War Assets.

The Court: Was it against War Assets? [89]

A. Yes.

The Court: Claiming a return, was he?

A. Yes.

The Court: From property purchased elsewhere? A. Yes, sir.

The Court: At some other Army Base?

A. No, sir, I think this was purchased through San Francisco War Assets.

The Court: Well I don't know this was a matter that had anything to do with this case, conversation relating to it; it might eventually turn out there is something more.

Mr. Lamb: I have no reluctance, your Honor, to go on to other matters, if that is the defendant's wish.

The Court: I think the law is if there has been some other offense or anything of that sort committed, some illegal act, and it is connected with the one under consideration the basis of the charge, then it might be admissible under the circum-

(Testimony of Lt. Harvey B. Apperson.)

stances, some transfer or some conversation but wholly unconnected with this present charge—now that is my understanding of the law on that.

Q. (By Mr. Lamb): Then Lieutenant, will you go on and just relate what took place up there and not relate any conversations or part of the activities he might have been engaged in?

A. He started talking about paying off or paying me what [90] he had promised and then he stopped and said, "wait until after the bellhop gets here." So we had further conversation and he waited until the bellhop came and we had a drink and then he reached under his bed and removed a bag, a traveling bag where he took out a large stack of tens and twenty dollar bills and counted out fifty twenty dollar bills and fifty ten dollar bills, handed it to me, and with this counting he explained to me he always carried it in small denominations.

Q. Did he first offer you the \$1500?

A. No.

Q. The fifty twenty dollar bills?

A. First he said, "I will give you \$1400."

Q. And what did you do or say?

A. Well I was dissatisfied.

Q. Did you say anything?

A. I didn't say anything.

Q. And then what did he do or say if anything?

A. He counted out fifty twenty dollar bills and fifty ten dollar bills, handed it to me and said, "Here, count this."

(Testimony of Lt. Harvey B. Apperson.)

Q. Did you? A. Yes, I counted it.

Q. And how much money was there?

A. There was \$1500.

Q. All right, and what did you do?

A. I asked him if I might have an envelope. It was [91] quite bulky. He reached into his brief case and took an envelope out and handed it to me. I didn't notice much about the envelope at the time but I did notice it had his letterhead on it. He handed me this envelope and I put the \$1500 in the envelope and sealed it and placed it in my left breast pocket.

Q. And then after the defendant had given you the \$1500 and you placed it in the envelope and sealed it and put it in your pocket then what did you do?

A. Oh, I had further conversation with him for maybe five, ten minutes and then left and got on the elevator and got downstairs where I met Mr. Matthews; I handed him the envelope with the money in it.

Q. Now, did any of these conversations which, concerning which you have been limited in relating, did any of these conversations which you had with him at that time relate to the, his securing this property out of the Air base and the payment to you of the \$1500?

A. He did say that this wasn't the last deal we hoped to have. He said he would like to have more dealings with me and went on to say if I ran into any-

(Testimony of Lt. Harvey B. Apperson.)

thing or ran into something that he might be interested in not to hesitate to call him collect at his New York address.

Q. And then you left the room and went down the elevator and handed the envelope to Mr. Matthews? [92]

A. That is correct.

Q. I show you an envelope marked Plaintiff's Exhibit 4 and ask you if that is the envelope which was given to you by the defendant, Meyer Schneider, in which you put the \$1500 which he gave you and which envelope you delivered to Jack Matthews as soon as you had left the defendant's room?

A. This is the envelope with the exception of a flap and my signature appears on the back.

Q. It was unsealed at the time the envelope was given to you and now the flap which seals the envelope is gone, is that correct? A. Yes.

Q. But outside of that is the envelope in the, substantially the same condition it was except for the signatures appearing on the rear thereof?

A. Yes, to the best of my knowledge.

Q. And this bears your signature upon it, the back, does it not? A. Yes, it does.

Q. And when did you place your signature upon the envelope?

A. I placed that on there when I came back to the F. B. I. I think prior to opening it or right after.

Q. And in whose presence was the—is this the flap that fits your notations on the back?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes.

Q. Is that the envelope with the exception of now being opened is the same as when you delivered it to Mr. Matthews except at that time it had the \$1500 in it, is that correct? A. That is correct.

Q. And after you had handed the envelope to Mr. Matthews what did you do?

A. Mr. Leonard—I didn't know it was Mr. Leonard at the time—I later found out—got me and we went into the men's room and he searched me again.

Q. Then when did you see the defendant again?

A. This is the first time, since then.

Mr. Lamb: You may cross-examine.

Cross-Examination

By Mr. Leibowitz:

Q. Lieutenant Apperson, you say, you testified that you came to the Great Falls Air base sometime in 1948, in April, I think—is that true?

A. Yes.

Q. And when you reached the Great Falls Air base you were not acting in the capacity of salvage officer then, were you? A. No.

Q. Your duty was what?

A. I was Port Control Officer. [94]

Q. And there is no relationship between the base salvage officer and port control, is there?

A. No.

Q. The duties are entirely distinct?

(Testimony of Lt. Harvey B. Apperson.)

A. That is correct.

Q. At the time you came to the Great Falls Air base some other individual officer or Army man was functioning as air base salvage officer, is that true?

A. That is correct.

Q. And when you were assigned to act as Air Force base salvage officer you acted in conjunction or with the other individual or to supplant the other individual? A. I replaced him.

Q. You replaced him completely? A. Yes.

Q. And that took place some time in July, 1948?

A. July or August.

Q. Now, when you were assigned and replaced the other officer I suppose you received or did you request a manual setting for the duties and functions of an Air base salvage officer?

A. There was a manual in the office.

Q. That wasn't specifically given to you, was it, by any particular individual or officer?

A. No.

Q. You simply found it there? A. Yes.

Q. And did you examine that manual?

A. Yes.

Q. Well, how far did you go as far as the examination of the manual itself; did you examine it from cover to cover? [95]

A. I read the pertinent parts. There are some parts that are reference.

Q. That part you deemed pertinent to your duties, is that so? A. Yes.

(Testimony of Lt. Harvey B. Apperson.)

Q. And of course you didn't read the entire thing, as you say? A. No.

Q. Now, you were shown Plaintiff's Exhibit 1, a manual and you were asked if that was the very same manual that was similar or the same one that you found—I will withdraw that question.

A. That is not the same manual.

Mr. Leibowitz: I will withdraw that question and reframe my question.

Q. Now this manual which is marked Plaintiff's Exhibit 1 and shown to you by Mr. Lamb is a manual that you have seen today for the first time, is that true, this particular one?

A. That I don't know. That may be the same one. It may be. There are thousands of them printed.

Q. And is there anything you can identify from the cover or any particular page or any reference made therein as to whether or not that is the same manual that you seen and you have read the pertinent portions of in the office at the air base?

A. That is a similar manual. [96]

Q. And similar, that is as far as you can go?

A. That may be the 50th copy that came off the press or it may be the 1000th.

Q. By similar, in what respect are they similar?

A. That means the information contained in that manual is exactly the same as the one I assumed custody of.

Q. When you say assumed it is the very same

(Testimony of Lt. Harvey B. Apperson.)

thing; you didn't read it, did you? You certainly didn't read it today?

A. Not that parictular one, no.

Q. Mr.—Lieutenant Apperson—if I sometimes make a mistake and say “Mr.” it is because I am not familiar with calling you Lieutenant. As in the manual that you have seen at your base is there any reference to the disposal of salvage material?

A. Yes.

Q. And is it your duty as an air base salvage officer to prepare the merchandise for invitations to bid?

A. As far as segregation, yes.

Q. In other words, what you mean by segregation is this, and if I am wrong you say so; that you receive in your warehouse a certain number of materials, mixed Army materials, and what you do then is to grade them into pants, jacekts, socks, etc., is that true?

A. It might be better if I explained what I do.

Q. Go ahead.

A. I receive material classified in two classifications, [97] either useful items or scrap. Now in the event that some items are classified as scrap I up grade those to useful items; however, I cannot down grade useful items to scrap without making proper paper work and so forth.

Q. In other words, the first function that you have when you receive material from some source at the air base is to separate the useful and the un-useful merchandise, isn't that so?

(Testimony of Lt. Harvey B. Apperson.)

A. I have never received those things mixed up.

Q. You don't receive them?

A. Never received them mixed up.

Q. In other words, they were separate as you received them? A. They were.

Q. What do you mean by segregating them?

A. I segregate in the case of scrap. I may get some cases would be B-29, so many parts, brass, lead, aluminum; there is what I mean by segregation as to ferrous and non-ferrous.

Q. Now your base salvage activities is not confined solely to textiles? A. No.

Q. It includes everything that may become scrap at the air base? A. That is right.

Q. Including B-29s? A. That is right.

Q. When you receive the useful materials at your place you mean useful in what respect? [98]

A. I mean that with very little repair they can be used again, not to the service but they can be used.

Q. As far as the service is concerned it is unusable?

A. Not usable. It might be used again but not for service.

Q. And you offer those out for sale?

A. That is correct.

Q. And in the very same fashion as the scrap is offered? A. Not in every case, no.

Q. I mean as far as the preparation of invitation to bid and as far as the contract is concerned?

A. Not in every case, no. Sometimes we put it

(Testimony of Lt. Harvey B. Apperson.)

up on large invitations to bid, sometimes we put it in small lots.

Q. I see, but whether you put it up to large invitations or small ones the procedure followed is practically the same? A. Practically.

Q. And of course you as an air base salvage officer are very much interested to see that you have a lot of bidders bidding on this merchandise?

A. That is correct.

Q. And would you say to that Mr. Lieutenant Apperson is that your function?

A. Partially, yes. I maintain a listing and there is also a list of bidders published by the Air Materiel Command.

Q. Now if you were to, or at least you testified that there was an advertisement in Waste Trade Journal, I think; [99] do you recall that, inviting people to bid on this merchandise? Do you recall you testified to that?

A. I don't know whether there was one in that periodical or not.

Q. If there had been one you had no connection with the advertisement of it? A. No.

Q. It was done by someone else? A. Yes.

Q. Whom do you think would be that someone else?

A. I presume it would be Lieutenant Greene.

Q. Lieutenant Greene?

A. Or the Air Materiel.

Q. In other words, besides yourself there are

(Testimony of Lt. Harvey B. Apperson.)

other, two individuals who have some control in the disposition of the sale of salvage material?

A. That is right.

Q. Do you have to report your activities to Lieutenant Greene and to the other individual that you mentioned before as to what is going on in your particular place?

A. Not to Lieutenant Greene. I do report to the Ogden Materiel Area.

Q. And what is his name?

A. There isn't an individual; it is a——

Q. Well what office is it?

A. The salvage branch of the Ogden Air Materiel Area.

Q. And is he at the Great Falls Air base?

A. No.

Q. Oh, he is somewhere else? [100]

A. He is at Ogden, Utah.

Q. Now every time that you receive any salvage material at your place do you receive a list of what it contains; in other words, there is a check upon your own activities, isn't there, as far as poundage is concerned? A. I presume so.

Q. Well has it ever occurred that there was a shortage between what you received and what they billed you for, put it that way?

A. I have very carefully counted it.

Q. I said has there ever been a shortage? Have you found the people who billed you for the salvage material had made a mistake?

(Testimony of Lt. Harvey B. Apperson.)

A. Not to my knowledge, with the exception of maybe the misnomenclature or misnamed an item.

Q. And the name sometimes is important too as for its classification as material, depending upon the value?

A. Maybe with the stock number but that is all.

Q. But in any event it was important to you for your own protection to carefully check what you received from them?

A. That is right.

Q. For your own protection?

A. That is right.

Q. Did you tag every single bag of material that you received?

A. No.

Q. Did you have any particular unit in mind when you [101] prepared these lots say in hundred pound bags or two hundred pound bags or three hundred?

A. No.

Q. You didn't?

A. No.

Q. Some of the bags may be of higher weight and smaller weight, is that so?

A. Would you elaborate on that? Are you talking about scrap or useful?

Q. I am talking about scrap?

A. They were baled in convenient size bales.

Q. Twenty-five pounds?

A. Maybe twenty pounds.

Q. Did you bale it on your premises?

A. Yes.

Q. It came to you loose, didn't it?

A. Yes.

(Testimony of Lt. Harvey B. Apperson.)

Q. And you knew how many pounds there were in that lot? A. Yes.

Q. And then you went ahead and put it up for bids?

A. No, I waited until after it was baled.

Q. But you knew how much you were going to bale in advance? A. Well, see——

Q. Well, for instance, to illustrate. You received say 1,000 pounds of scrap?

A. No, I didn't receive it that way.

Q. All right, put it in your language.

Mr. Lamb: Your Honor, I might suggest if counsel would permit the Lieutenant to answer the question rather than suggesting all these things. Perhaps the Lieutenant can [102] explain it so Mr. Leibowitz can understand it.

A. I receive maybe two socks, maybe three socks, maybe five shirts, maybe five shirts that were in the state of rags that were sent to me as fair wear and tear and they were, maybe in some cases had sleeves ripped off or ripped out or acid on them, and we receive those as is one day, and we take those shirts and bale them up and carry those as pounds of cotton. In cases where wool we carry those as so many pounds of wool. However, if they get into the mixed confusion of rags we don't know what they; they are rags then and carried as pounds.

Q. In other words, you receive them as small units and accumulate them and when you feel there

(Testimony of Lt. Harvey B. Apperson.)

is sufficient amounts to bale up you use your judgment and bale them up? A. Yes.

Q. But in any event the amount of stuff you have on hand is known to some other officials?

A. Well, of course, monthly reports that we send in how much weight we have.

Q. Has it ever happened that your monthly reports did not correspond with the reports they have of merchandise they sent to you?

A. They wouldn't have it by pound because that was a figure I arrived at and I estimated it.

Q. Any time when they said your report isn't accurate or it doesn't correspond with their own reports? [103]

A. Some cases maybe in addition, arithmetic, but not in amounts.

Q. In any events you are checked carefully?

A. Yes.

Q. And you knew you were being checked?

A. Beg your pardon?

Q. You knew you were being checked?

A. Well nobody ever counted or weighed.

Q. But you felt there was some superior officer who was keeping his eyes on those things?

A. I didn't keep account of it for that reason.

Q. Yes, all right. Now we come to the useful materials. Now is, when you receive that do you receive those useful materials the same way—first, you received scrap material?

A. Yes, individual.

(Testimony of Lt. Harvey B. Apperson.)

Q. And when you accumulated what you thought was sufficient quantity you just went ahead and baled it up? A. No, not the useful items.

Q. You handled that a little differently?

A. They were kept as individual items.

Q. Did you sort them to correspond such as, and carry all material, for example, trousers as trousers and jackets as jackets?

A. You mean physically did we pile them?

Q. Physically you piled them that way?

A. Sometimes we did and sometimes we didn't.

Q. Depending on whose judgment?

A. On whose?

Q. Depending on your judgment?

A. On my own.

Q. When you confused or you have placed pants and jackets and some of the other things together were you ever told that you didn't do it correctly or you should do it differently, or out of lack of experience maybe was it ever said to you it might be more profitable for the Government if you went ahead and have kept the pants out of the field jackets or you should put the field jackets and the pants together, etc.?

A. Well that was left more or less to my own judgment what I could do. I had help if that is what you are getting at.

Q. No, I don't mean the help. But, all right, that was left to your own discretion as to that. Now after you accumulated sufficient scrap and sufficient

(Testimony of Lt. Harvey B. Apperson.)

useful material did you recommend to the officer that it is time for it to be sold to the public?

A. At the time?

Q. No, not at that time. I just want to get your——

A. I can't answer the question.

Q. Then answer it anyway you want. Answer it your way.

A. At the time we all know Berlin was blockaded and we were having quite a bit of confusion——

Q. Will you keep your voice up a little bit?

A. We had trouble with the building space. That is because—I had better go into the background of the procedure. We set up lots so that the small business man has a chance to bid on these things. At the time we were short of building space and warehouse space, so they were set up in one big lot, and “Victuals” came along and we were moved time and time again.

Q. Lieutenant, you said “we,” now who is the other person?

A. I mean myself and my assistants.

Q. Someone in the warehouse, is that what you mean?

A. Well, my assistants.

Q. Well in the warehouse or just your assistants somewheres outside of the warehouse? We will take Lieutenant Greene, would you call him your assistant?

A. He assisted me. He wasn't actually under my command.

Q. Well that is what I mean by an assistant, did

(Testimony of Lt. Harvey B. Apperson.)

he work under you, did he take orders from you, or was he equal rank of yours or worked in cooperation with you?

A. He worked in cooperation with me.

Q. Did you have to tell anybody that I think we are just loaded up with this merchandise and we are getting crowded and I think we ought to go ahead and offer it out to the public?

A. Oh, yes, that was my duty when we got a sufficient amount of the stuff together where it would make it profitable [106] for a buyer or make it worthwhile we put it out.

Q. I am interested, Lieutenant Apperson—I am not trying to make a mystery out of it. I just want to know what is actually the policy with reference to disposal of the merchandise. So I am not trying to ask any tricky questions. I just want to know. Can you explain it any way to us. If you were the person who determined the time and disposition of the merchandise or would you have to receive instructions from someone else before that merchandise can be disposed of?

A. I told the purchasing and contracting officer when I was ready. I have to work at his convenience too because he has other things to do and many more things and much more business to handle and it is at his convenience as well as mine.

Q. In other words then he acted as veto on your recommendation?

A. I never had to pin him down that hard.

Q. Well I want to know if you came along to

(Testimony of Lt. Harvey B. Apperson.)

him and say, here I think we ought to get rid of this merchandise, and it is piling up and we should dispose of it, and let's assume he said "No," would that be the end of it? Or can you say, I don't care what you say, I have got to have this stuff out because it is crowding up?

A. If I needed the warehouse very badly I would.

Q. Ignore him? [107]

A. I would go over his head. However, he would still have to sit in for the sale because I have no authority to write a contract.

Q. So as far as you can go you can recommend the sale of this merchandise to the public to the procurement officer, say?

A. I can recommend it to the public through——

Q. Through—all right. Now we go into the procurement officer, and in this case, Lieutenant Greene, correct?

A. Correct.

Q. And from that point on he takes over, wouldn't he? Well, as far as setting up the schedules and the amount of stuff that is being offered, you have nothing to do with that?

A. I do only for how much is to be sold and when I want to sell it I come to him and we get together and consider it, and he explains to me when it is convenient, and between the two of us we arrive at a date when the bids are to be opened.

Q. Have you anything to do with the preparation of brochures or pamphlets or anything sent out to the bidders?

(Testimony of Lt. Harvey B. Apperson.)

A. No. Sometimes it depends. I can prepare them or he can prepare them, either one of us.

Q. Now after you have both decided and the pamphlet is prepared and an attempt is made, or at least an effort is made to invite people to bid on the merchandise you have, [108] from that point on you are through, am I correct?

A. With the exception of seeing that the Government gets a fair deal. I can turn down a bid any time I wanted.

Mr. Lamb: Let him answer the question.

Q. I will let you, give you an opportunity to explain that. I don't want to conceal anything. Now, bidders, let's assume after the pamphlet is out people put their bid in, correct? A. Correct.

Q. And along with their bid they send their checks which is required by the contract, true?

A. That is correct.

Q. Incidentally, that contract isn't prepared by you? A. No.

Q. It was never prepared by you?

A. Never.

Q. Not even under your control as far as the clauses in that contract?

A. I can recommend to a certain extent.

Q. Well isn't that, Mr. Lieutenant Apperson, isn't that a contract that is used all over the United States? A. I presume so, yes.

Q. And it is probably prepared by—well, perhaps in Washington—I don't know.

(Testimony of Lt. Harvey B. Apperson.)

A. I presume so, I don't know.

Q. So in any event we are agreed that so far as the provisions in the contract you have absolutely nothing to do [109] with it?

A. That is correct.

Q. And you can't even vary the terms of the contract, can you, with exception?

A. With exception of fair return to the Government, and in some cases where it would be more convenient and more easy and more revenue for the Government as to when the material is to be moved and so forth I can.

Q. The contract itself provides for your line of exceptions, doesn't it?

A. I presume so. I am not too familiar with the contract.

Q. You say you are not familiar with the terms of the contract?

Mr. Lamb: That isn't what he said. He said he was not too familiar with the terms.

Q. I don't know what you mean by not too familiar. At least you are not familiar with every provision in there? I am not trying to embarrass you.

A. I don't have the contract right here in front of me. I doubt if anybody in the service can quote it word for word without it in front of him.

Q. Well in any event then we agree on this, that if there are any exceptions, these exceptions are incorporated in that contract?

(Testimony of Lt. Harvey B. Apperson.)

A. Specifically what? [110]

Q. Well as to, for example, supposing delivery cannot be effected at a certain time, you can get a waiver from the area control office or something like that?

A. I don't think a waiver would be necessary.

Q. You would have control over that yourself?

A. Yes.

Q. In other words, if a man doesn't obtain delivery or refuses to obtain delivery for reasons inconvenient to him to get delivery in ten days in the terms of the contract you could make an exception in his case?

A. Yes, I think I could.

Q. You don't have to pounce upon him and you could if you wanted to?

Mr. Lamb: Your Honor, I am going to object to the form of that question. There is no inference Lieutenant Apperson is going to pounce on anyone.

Q. I used the word pounce not in the sense of physical pouncing. I mean you are not going to enforce the rigid terms of the contract and declare a forfeiture, that is what I mean?

A. After ten days?

Q. Yes. A. I can declare him forfeited.

Q. You can? A. Yes.

Q. But you don't have to do it if you don't want to do it? A. It depends on how——

Q. It wasn't done in the Schneider case, in this case? [111] A. No.

(Testimony of Lt. Harvey B. Apperson.)

Q. You threatened, however, to do it?

A. Yes.

Q. Did you do it because it was Mr. Schneider?

A. No.

Q. You did it because—for what reason—too far away; he was far away from here?

Mr. Lamb: Let him answer the question, if you will please, Mr. Leibowitz.

A. I didn't do it—it was because he was far away was the reason I didn't, and also his bid represented a good price to the Government and good return to the Government.

Q. Now from your experience and of course you have the experience of having other people bid on the merchandise would you say that his price, that his bid was a foolish price?

Mr. Lamb: We object to that as calling for a conclusion.

Q. I am asking him if he knows from his experience?

The Court: I will sustain the objection; that is not a proper question.

Q. Well you have stated on direct, Lieutenant Apperson, that his price was too high?

A. I didn't say too high.

Q. What did you say in reference to it?

A. I said it was high. It was high enough to make it a very good return to the Government.

Q. Did you know whether Mr. Schneider could make a profit on that? A. I did not.

(Testimony of Lt. Harvey B. Apperson.)

Q. You did not? Did he tell you that he could make a profit?

A. In the course of the conversation he said that was a pretty good business; that he did make profits.

Q. So as far as he was concerned it was a correct price and as far as the Government was concerned it was a high price?

The Court: Treat the witness fairly. You have piled up two or three questions there all at once.

Mr. Leibowitz: I withdraw that.

Q. As far as Mr. Schneider is concerned it was a fair price to pay for the merchandise?

Mr. Lamb: To which we object as being a conclusion, the evidence now showing that the defendant, Schneider, put in the bid himself; he selected the price, and it is calling for a conclusion of the Lieutenant anything as far as the defendant is concerned.

Mr. Leibowitz: The Lieutenant testified, he said the price of Mr. Schneider was high. And I don't want the jury to get the impression that the price was so high he was trying to get something to take him out of the loss.

Mr. Lamb: I will withdraw my objection.

Q. As far as the Government is concerned that price was a good return? A. It was. [113]

Q. And as far as Mr. Schneider was concerned

(Testimony of Lt. Harvey B. Apperson.)

he thought he could make a profit on it notwithstanding the price he paid?

A. He said he could make a profit on all that sort of that stuff, whether he was talking about this particular stuff or not—Your Honor, I don't see how it is too relevant.

Q. Now, Lieutenant Apperson, did you and Lieutenant Greene ever discuss the sale to Mr. Schneider before he came to Great Falls and before he took delivery of the merchandise at Great Falls?

A. Yes, we did.

Q. Did Lieutenant Greene ever tell you that Mr. Schneider had written a letter to him in which he asked him to ship the merchandise to New York, did he tell you that or something like it?

A. There was some question whether we could ship it. I explained to Lieutenant Greene it was impossible.

Q. In other words, Lieutenant Greene did tell you Mr. Schneider had written one letter or several letters?

A. I don't remember whether he said he had written any letters or not. I think he asked me whether he could ship. That comes up with every contract we have.

Q. And did Lieutenant Greene ever tell you that Mr. Schneider had asked him to furnish labor here at his expense, at Mr. Schneider's expense, so that he would not have to come to Great Falls to pick up the merchandise? A. I don't remember.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Lamb: Would you like to have the letter?
The original letter?

Mr. Leibowitz: Yes.

Q. Well I will show you the letter and ask Lieutenant Apperson first if Lieutenant Greene had ever showed you this letter, shown you this letter and ever discussed the contents of this letter?

A. I will say again that I remember that Lieutenant Greene said something about shipping the stuff to him, and I will say again that I told him it was impossible, and that we couldn't load it and we wouldn't load it.

Mr. Lamb: Mr. Leibowitz, would you like to have that letter submitted in the record?

Mr. Leibowitz: That is what I will do.

The Court: It is offered in evidence?

Mr. Leibowitz: Yes.

Mr. Lamb: I have no objection, your Honor.

The Court: It may be received in evidence.

(Whereupon said Defendant's Exhibit No. 5, being a letter from Mr. Schneider to Lieutenant Greene, offered and received in evidence, is a part of this record.)

Mr. Leibowitz: May I be permitted to read that, please?

The Court: Yes.

Mr. Leibowitz read Defendant's Exhibit No. 5 to the court and jury. [115]

Mr. Lamb: Would you like to have the answer to that letter?

(Testimony of Lt. Harvey B. Apperson.)

Mr. Leibowitz: Yes.

Mr. Lamb: That was dated October 18th—unless you have the original.

Mr. Leibowitz: I have the original. We wired for it and it will come in tomorrow.

Mr. Lamb: I will give you a copy.

Mr. Leibowitz: Now that is an answer to that letter?

Mr. Lamb: I assume it is.

Mr. Leibowitz: This letter is an answer.

Mr. Angland: Just a minute, Mr. Leibowitz, don't you think it better be marked and offered in evidence before it is read into, to the jury?

Mr. Leibowitz: Defendant's Exhibit No. 6.

The Court: Is it offered in evidence?

Mr. Leibowitz: Offered in evidence.

Mr. Lamb: No objection.

The Court: It may be received in evidence; both of them?

Mr. Leibowitz: Yes.

(Mr. Leibowitz read Defendant's Exhibit No. 6 to the court and jury.)

(Whereupon said Defendant's Exhibit No. 6, being a [116] letter from Lieutenant Greene to Mr. Schneider, offered and received in evidence, is a part of this record.)

Q. Now, Lieutenant Apperson, reference is made to these letters to a word "overage." Now will you please be good enough to explain what this overage is?

(Testimony of Lt. Harvey B. Apperson.)

A. The reason that clause is put into the contract is that all these weights are estimated. I say that is the reason that is put in the contract is these weights are estimated. Now we varied. We may over estimate and we may estimate a smaller amount. When you pack it up you can't guess the pounds so that 25% overage is put in there so that in case there is 1,000 pounds and there may be 1,100 pounds. The reason that is put in there is so that you can have the benefit of buying at the unit cost that other 100 pounds, or in the event we have estimated short on these weights he only buys 900 but he would pay less, of course.

Q. Now is it correct to say that in this particular instance Mr. Schneider purchased approximately sixteen or seventeen thousand pounds of rags and requested an additional 25% pursuant to the contract?

A. If available.

Q. If available. And do you know whether it was available or not at that time?

A. Those rags were being generated all the time they were coming and we couldn't tell.

Q. Did you know whether 25% was there to give him? [117]

A. I wouldn't have known at the time whether there was shortage or over.

Q. Would you say on October 26th, 1948, when Lieutenant Greene had written a letter in which he stated that there will be an overage of 25% "and we allow 25%"?

Mr. Lamb: He didn't say there would be. He

(Testimony of Lt. Harvey B. Apperson.)

said they would allow 25%. I will have to ask you not to misquote the letter.

Q. Would you say, Lieutenant Apperson, in any event having the benefit of time—whether at that time on October 26, 1948, there was an overage of 25% available?

A. I would say I wouldn't know.

Q. You say that you don't know because you don't recollect, are you saying that, or is it you definitely don't know?

A. I do not know. However, I know that there was within 25% of the amount stated on the contract either way, and you know that.

Q. There was a possibility of 25% at any rate from the inventory book you kept at the Air base sales office? A. Yes, estimated weight.

Q. And, of course, when Mr. Lieutenant Greene had written a letter discussing the percentage and overage, Lieutenant Greene has an inventory book available to him at his office?

A. No, not at his office. [118]

Q. Let's assume Lieutenant Greene wanted to know how much stuff you had, would he have to come to you in order to find out or could he obtain it elsewhere?

A. He would have to come to me.

Q. As his only source?

A. That is right, unless he wanted to refer back to a past report we submitted, however, that might be more or less, or how much stuff we picked up in the meantime.

(Testimony of Lt. Harvey B. Apperson.)

Q. But let us assume you were not available for some reason; can he obtain that information from that area commander somewheres in Utah?

A. He can obtain the weight correctly between the 25th and the end of the month; however, that is something that is a running figure that weight, it varies.

Q. You get more stuff?

A. We get more stuff in and utilize quite a few rags in everyday operations in the shops.

Q. But in any event if you weren't around, he could get the information from Utah? Wire Utah?

A. He could get it from the Sergeant. I doubt if he would wire Utah.

Q. But if he wanted to wire Utah, it would be made available?

A. And could get the figure how much we had on hand a certain date. [119]

Q. A certain date?

A. However, that is a one day a month report. However, he could find out from Utah between the 10th and 20th.

Q. That is at a certain time he could get that information? A. That is right.

Mr. Lamb: I have the Major from the Air base to show the records of appointment of Lieutenant Apperson.

The Court: Those were the books?

Mr. Lamb: The order appointing Lieutenant Apperson as Base Salvage Officer, which the defendant requested, and I have those records.

(Testimony of Lt. Harvey B. Apperson.)

The Court: Is there an officer here from the Base in charge of them?

Mr. Lamb: Yes, sir.

The Court: Very well, that is what they called for. We will have to put it in. We will suspend this cross-examination until that is put in. Bring him in.

The Court: We will take a recess.

(4:35 p.m.)

(Court resumed, pursuant to recess, at 4:45 o'clock p.m. at which time the jury, defendant, and all counsel were present.)

Mr. Lamb: Major Redding may be sworn, please. [120]

MAJOR C. E. REDDING

was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is C. E. Redding?

A. That is correct.

Q. And you are a Major in the United States Air Force? A. Right.

Q. And what position do you occupy in the Air Force Base adjacent to the city of Great Falls, Montana?

A. I am Adjutant General of the 1701st Air Transport Wing.

(Testimony of Major C. E. Redding.)

Q. And as such you have in your possession a duplicate original of the Special Order pertaining to Lieutenant Harvey B. Apperson?

A. That is correct.

Q. I will show you an instrument marked Plaintiff's Exhibit 7, being Consolidated Special Order No. 48, and ask you if this is a duplicate original of the order pertaining to Lieutenant Harvey B. Apperson? A. It is.

Mr. Leibowitz: May I interpose an objection at this time? We have no record here or statement just where it came from and what happened to the original. I think we ought to get some information along that line.

Q. In the furnishing of a special order in the Army or [121] the Air Force how does the order come into existence?

A. The various paragraphs are all originated by the office concerned and sent to a special order clerk who cuts a stencil and the prescribed number of copies are run off from the stencil. The originating officer who is as known in our headquarters as the Adjutant General signs it to make it a special order.

Q. Then in other words if a special order was cut out at the Air base today, you as Adjutant General would sign the stencil? A. That is correct.

Q. And that all of the copies then which were run off from the stencil would have the character of being originals, is that correct? A. Exactly.

Q. And is the Special Order No. 48, dated Au-

(Testimony of Major C. E. Redding.)

gust 4, 1948, marked Plaintiff's Exhibit 7, of that character? A. It is.

Q. And is the exhibit which you have brought here and which has been identified as Plaintiff's Exhibit 7 part of the official records of the Air Base adjacent to the city of Great Falls, Montana?

A. It is.

Q. And what paragraph is it that pertains to Lieutenant Apperson? A. Paragraph 12.

Q. And the other paragraphs contained therein pertain to other members of the Armed Forces?

A. That is right. [122]

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit 7, and the particular paragraph 12 thereof pertaining to Lieutenant Apperson?

Mr. Leibowitz: You are not just offering the back side of it, are you?

Mr. Lamb: I am offering the whole exhibit.

Mr. Leibowitz: I object to it for this reason, your Honor. Counts 1 and 2 of the indictment set forth that Lieutenant Apperson is the Base Salvage Officer. The description here certainly is not a Base Salvage Officer and for that reason I think that it is objectionable.

The Court: The question in regard—

Mr. Lamb: Paragraph 12, your Honor.

The Court: I don't see that your objection can be any good under that paragraph. Question him about that and see what his duties are as salvage officer, whether it said so in No. 12, using a whole lot of abbreviations and letters. I suppose the Army officer would know.

(Testimony of Major C. E. Redding.)

Q. (By Mr. Lamb): The paragraph in particular reads, "with primary duty as salvage and property disposal officer." In the fall of 1948 were you out at the Air base?

Mr. Leibowitz: Your Honor, I just want to object to this line of testimony with reference to the explanation what that document is. [123]

The Court: Oh, no, I will let him explain it.

Mr. Leibowitz: I just want to object to it.

The Court: The objection is overruled.

Mr. Leibowitz: And get my exception.

The Court: Go ahead.

A. I was at the Base from the 15th of October, 1948.

Q. From October 15th, 1948, and particularly in November, 1948, was there any other salvage officer at the East Base?

Mr. Emigh: To which we object as incompetent, irrelevant and immaterial and not explaining the document in his hand, and not being in accordance with the charge of the indictment.

The Court: Oh, well, I think your objection is altogether too broad and I will overrule the objection. Go ahead, let's find out about this salvage officer.

A. To my knowledge there was not any other salvage officer.

Mr. Leibowitz: I move the answer be stricken.

The Court: Than Lieutenant Apperson?

A. Than Lieutenant Apperson.

(Testimony of Major C. E. Redding.)

The Court: And this shows his appointment as salvage officer, does it, this No. 12, paragraph No. 12?

A. That is correct. The only difference in the order is it also mentions property disposal. [124]

The Court: That is all right.

Q. (By Mr. Lamb): This particular order does make him Base Salvage Officer, is that correct?

A. Yes.

Mr. Leibowitz: Of course, we have our objection?

The Court: Yes, you have your objection. It is submitted in evidence. Your objection is overruled.

Cross-Examination

By Mr. Leibowitz:

Q. Major Redding, of course, you didn't have anything to do with the appointment of Lieutenant Apperson, did you? A. I did not.

Q. And what you brought here is something you found in the files at the Air base?

A. That is correct.

Q. An original was prepared; was it prepared pursuant to this order, is that true?

A. It was not.

Q. It was prepared apparently by order of Colonel Chennault? A. Right.

Q. Is there anything on this exhibit which would indicate that it is a duplicate original of the one that was actually, contained the signature of Colonel Chennault? [125]

(Testimony of Major C. E. Redding.)

Mr. Angland: Just a minute. Your Honor, to which we object. I think the question is wholly irrelevant and immaterial. The witness has testified to an official record of the Government and as such would be admissible.

The Court: Yes, it is an official record and it is kept there at the headquarters, isn't it?

A. Yes, sir.

The Court: Colonel Chennault was the Commanding Officer at the time?

A. Colonel Chennault did not sign orders himself. It was by order of Colonel Chennault. It is signed by members of his staff.

Q. (By Mr. Leibowitz): Is there anything on that paper or document which contains the signature of a member of his staff?

Mr. Angland: To which we object, your Honor. It is irrelevant and immaterial. It is unnecessary. It is an official record.

Mr. Leibowitz: It what?

Mr. Angland: It is an official record.

Mr. Leibowitz: It isn't official because it is brought out of the file. It is official by virtue of some signature, otherwise it is a scrap of paper.

Q. How do you explain that, Major Redding?

A. I believe there is evidence of a signature; it isn't [126] clear on all pages.

Q. (By Mr. Leibowitz): Will you point here what you call a signature?

(Testimony of Major C. E. Redding.)

A. Well this is on the cover sheet and let's get the one that has paragraph 12 on it.

Q. Well I want the record to show that Major Redding has pointed to the two names, one name which appears on the first page of the exhibit, Plaintiff's Exhibit 7, and the other one on page 5, the last page. Am I correct? A. That is right.

Q. I want the record to show—of course, you don't know, Major Redding, if that is the signature of the man whose name appears on the front and last sheet, of the men whose names appear on the front and last sheet?

A. All I can say is it resembles them.

Q. Are they still at the Air base?

A. That was Caples—no, he is not there any more. He has been reassigned.

Mr. Leibowitz: Well we object to the admission of it.

Q. (By The Court): Well, Major Redding, this is an official document that you keep in your office? Are you Adjutant General? A. I am.

Q. That is your title? A. Yes. [127]

Q. And you have charge and custody of these official documents and are orders directing this officer or that officer to serve here or there in some certain capacity? A. That is correct.

Q. And that entire document there that is offered contains official orders? A. Yes.

Q. And it is signed by some member of the staff of the commanding officer of the Base, is that it?

(Testimony of Major C. E. Redding.)

A. That is correct.

Q. And you sign some segments of this official document, don't you? A. Yes.

The Court: Well that is sufficient. I will overrule the objection. It may be admitted in evidence.

Mr. Leibowitz: I will take the exception from it.

(Whereupon said Plaintiff's Exhibit No. 7, Special Order No. 48, offered and received in evidence, is a part of this record.)

The Court: Any further cross-examination?

Q. (By Mr. Leibowitz): Major Redding, do you know anything about this case?

A. I know nothing about the case.

Q. Have you heard of it at the time when you came there on October 15th—have you heard anything around referring about this thing?

A. I might have heard it mentioned. I believe I did. [128]

Q. But in any event you had nothing to do with any of the pre-arrangements?

Mr. Lamb: To which we object as not being proper cross-examination. It was not gone into on cross-examination.

The Court: Not proper cross-examination; objection is sustained.

Q. Did Lieutenant Apperson call upon you for and ask permission to do certain acts with reference to obtaining of salvage materials for Mr. Schneider?

A. No.

Q. He didn't—all right, that is all right.

(Testimony of Major C. E. Redding.)

Mr. Lamb: Your Honor, I have one more question on direct examination if I may have permission to reopen.

The Court: Yes.

Q. (By Mr. Lamb): Lieutenant Redding, was the order which has now been admitted in evidence as Plaintiff's Exhibit 7 in full force and effect on November 22nd and November 23rd, 1948?

Mr. Leibowitz: I object to it. The exhibit is in evidence and speaks for itself.

The Court: What are the dates on there?

Mr. Angland: It was issued in August, your Honor.

The Court: I will permit him to answer the question. Did the order continue on? Was he actively engaged, do you know?

A. The order continues until it is superseded by another [129] order.

The Court: When was it superseded, do you know?

A. All I can say is that to my knowledge Lieutenant Apperson was Base Accountable Officer until he was transferred February 12th, 1949.

Q. (By Mr. Lamb): What do you mean by Base Accountable Officer?

A. I mean Base Salvage Officer.

Q. Until he was transferred in February, 1949?

A. Yes.

Q. To your knowledge?

A. That is to my knowledge.

Q. Major, do you personally know whether or

(Testimony of Major C. E. Redding.)

not on November 22 and November 23, 1948, whether Lieutenant Harvey B. Apperson was the Base Salvage Officer at the Airbase on that particular date?

Mr. Leibowitz: I object to it. I think the witness——

Q. He was the Salvage Officer from the time he was appointed and designated as such in August until February, 1949, when he was transferred?

A. Yes.

Q. And that was of your own personal knowledge? A. Yes.

The Court: Yes, that is the way he testified.

Mr. Leibowitz: Of course, I have my exception to it. [130]

The Court: Oh, yes, certainly you have your exception.

The Court: I think we will suspend here and continue the cross-examination until tomorrow morning.

(Whereupon the court admonished the jury.)

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock. (5:10 p.m.) December 13, 1949.

(Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on December 14, 1949, at which time the jury, defendant, and all counsel were present.)

The Court: Mr. Leibowitz, I believe we interrupted your cross-examination yesterday.

Mr. Lamb: Will you take the stand, please?

LT. HARVEY B. APPERSON

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Leibowitz:

Q. Lieutenant Apperson, you stated that the merchandise that came out of warehouse 1045 and loaded on the truck and into the railroad car was valued to the Government at a cost price of approximately \$36,000?

A. That is correct, original purchase price.

Q. Original purchase price. Can you tell us what the original purchase price to the Government was on the scrap materials that was sold legitimately to Mr. Schneider?

A. I could with some research.

Q. Well can you give us an estimate of how much it cost to the Government?

A. Not offhand, no.

Q. Would it be an exaggeration to say that it might be worth, cost to the Government one hundred fifty, two hundred thousand dollars? [132]

A. I couldn't give an estimate at all.

Q. Well, let's take it this way. Well, can you tell us how much was the value of the merchandise that was loaded on the car and came out of 1045, what value was there as a salvage price?

A. That would be very hard to get at. It depends on what is bid. I understand that since that time it has been sold and it amounts to approximately \$8,000.

(Testimony of Lt. Harvey B. Apperson.)

Q. \$8,000?

A. Or the bid amounted to \$8,000, and that is what the Government received.

Q. That is what the Government received?

A. That is correct.

Q. Now, Mr. Lieutenant Apperson, before you loaded these cars and you had to get the permission of the Colonel, did you? A. No.

Q. Well at that time you had secured permission from the Colonel to go along with the F.B.I.?

A. Yes.

Q. In other words, at your own initiative with the consent of the Colonel superintended this merchandise taken from the warehouse and loaded on the trucks?

A. Yes, I presume so. I mean, it is hard to, the circumstances that——

Q. Well, still let's assume Mr. Schneider came to you and said: "Now, here, let me have this merchandise." And you [133] said: "All right, I am going along with you and let's take the merchandise out at six o'clock in the evening." And which was done in this very case. Could you have accommodated him in that way? Could you have done that?

A. I couldn't have done it legally. I mean, I couldn't have.

Q. Well, by legally you mean you would have violated rules and regulations?

(Testimony of Lt. Harvey B. Apperson.)

A. It is exactly the same as taking anything that doesn't belong to me.

Q. Is that the only way you could have done that is by stealing the merchandise?

A. However, if he had legitimately bought——

Q. I haven't asked you that question, if he legitimately bought.

A. I could answer the question I could have moved it to another warehouse.

Q. I asked you—moved it to a warehouse and had it loaded in Government trucks and taken to the depot and put in the railroad car and off it went?

A. I couldn't have done it legally.

Q. You couldn't have done it? A. No.

Q. And the only time you could have done it would have been if you stole it and no one was around to see you do it? A. That is correct.

Q. Now, Lieutenant Apperson, this stuff was loaded after six o'clock, is that so? A. Which?

Q. Just about? A. Which.

Q. The stuff that came out of 1045; all the stuff as a matter of fact?

A. No, that was finished about six o'clock.

Q. Well, when did you start?

A. Three thirty, four o'clock, somewheres in there.

Q. And that was after the servicemen had been through with their day's work?

A. Yes, as far as their regular routine duties.

Q. Was the car already on the railroad track?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes.

Q. Now I understand that Government trucks or truck was used in carting of the merchandise from the warehouse to the loading depot?

A. That is right.

Q. Do you have a right ordinarily as part of your duties in shipping this merchandise, the right to use Government trucks to do so?

A. Within reason, of course.

Q. I beg your pardon.

A. On Government property, yes.

Q. Well for shipment to a purchaser, a man who purchases merchandise?

A. Well, under the terms of the contract I wouldn't have hauled it into Great Falls.

Q. You couldn't do it under the terms of the contract, is that so?

A. It was more or less an accommodation. [135]

Q. But if you accommodated, it would be a violation of rules and regulations and so forth?

A. Not entirely, no.

Q. Well, certainly it isn't part of the contract?

A. It isn't part of the contract; however, there is no regulation saying I can't use Government transportation.

Q. Well, if you chose to do it on behalf of one, it would be rather unfair not to do it on behalf of another?

The Court: Well, that is rather argumentative.

Mr. Leibowitz: I will withdraw that question.

(Testimony of Lt. Harvey B. Apperson.)

Q. Now in order to obtain the right to a truck you would have to receive permission from some individual or personnel or person at the Airbase?

A. Not particularly, no.

Q. In other words, you would just go up to the place where a truck is and say: "Now, here, I want you to come down and take stuff out of this warehouse and bring it right to the depot."

A. It wasn't down at the depot.

Q. Or wherever the loading base was?

A. Yes, all I would have to do is pick up the telephone.

Q. And you wouldn't be questioned?

A. No.

Q. Nobody would reproach you for doing that?

A. No.

Q. Have you ever done that before?

A. Yes, every day I call a truck, if that is what you mean. [136]

Q. What is that?

A. Every day I obtain trucks on the base.

Q. I don't mean every day. Every day you didn't have merchandise?

A. Is your question whether I moved material with a truck before?

Q. Use a truck for civilian, for people who had purchased?

A. This was the first time while I was salvage officer that I ever moved things with a Government truck.

(Testimony of Lt. Harvey B. Apperson.)

Q. In other words, Mr. Lieutenant Apperson, you wouldn't have the authority to command here a truck and have it used for the purpose of complying with a contract that you entered into with a civilian, would you?

A. It all depends. It depends on the circumstances.

Q. Well, you haven't done it as long as you have been there at the base, you so testified?

A. Would you ask the question again, please?

Q. Mr. Schneider—put it in this form. Mr. Schneider purchased the material. He wants to have a delivery made of that material. He says: "I can't get a truck, or I don't want to get a truck, or I can't get a truck from Great Falls; will you get a truck for me, a Government truck, and cart this material right to the loading base." And would you do it?

A. Under the circumstances, yes.

Q. Well, isn't it a fact, Mr. Lieutenant Apperson, that is exactly what Mr. Schneider had requested in one letter after another and one telephone call after another?

A. He requested we load and ship this material to him.

Q. Yes.

A. It involves quite a bit of time and labor. Things don't fly from the truck into the freight car.

Q. Yes, but in this case the loading was done by G.I. labor?

(Testimony of Lt. Harvey B. Apperson.)

A. That is right, and Mr. Schneider reimbursed them for that labor.

Q. And that is exactly what Mr. Schneider requested in telephone conversations with you?

A. He had never made an agreement with me.

Q. I didn't ask you whether he made an agreement.

A. He had never indicated before paying for the labor.

Q. He kept on seeking this and you wrote back, didn't you? A. I didn't write him at all.

Q. Lieutenant Greene said that no Government handling will be furnished? A. That is right.

Q. Would you say that Mr. Schneider never requested, never wanted to pay or never requested that labor be furnished and he pay for it?

A. He didn't say one way or another.

Q. Well, did you say it could be done if he paid for [138] the labor?

A. That was in the contract.

Q. In other words, it couldn't have been done?

A. He would have had to hire his own labor. That takes time, too. I am not working for Mr. Schneider.

Q. Did Mr. Schneider have a hard job in getting the half a dozen boys at the Airbase to load this car?

A. Not particularly.

Q. On the 23rd? A. Not particularly.

Q. No trouble at all; as a matter of fact you accommodated him and furnished the labor?

A. That is right.

(Testimony of Lt. Harvey B. Apperson.)

Q. You went out of your way in order to secure that labor? A. Not particularly, no.

Q. You just asked the half a dozen individuals if they wanted to make some money?

A. I couldn't have spent a day to obtain labor for him.

Q. But you didn't spend a day obtaining this labor, did you? A. No.

Q. How long did it take you?

A. Twenty minutes, half an hour.

Q. Well, would it take any more if you desired to accommodate him? A. Beg your pardon?

Q. Would it have taken any more if you desired to accommodate him if he were in New York City and made that request?

A. I couldn't very well go on nothing. I couldn't get [139] him the labor and I couldn't order my people to do it on Government time or their own time without any knowledge of their being paid for it.

Q. In other words, you were perfectly willing to depart from the terms of the contract?

A. It wasn't departing from the terms of the contract.

Q. You furnished Government labor, which you didn't——

The Court: That is argumentative. Suppose you drop this part of it. It is getting repetitious possibly.

Mr. Leibowitz: All right.

(Testimony of Lt. Harvey B. Apperson.)

Q. Now, Lieutenant Apperson, base No. 1045 is located where as with reference to your office; with reference to your own office how far is it away from your place?

A. Building No. 1045 is approximately three blocks.

Q. Three blocks. And how far is it from the railroad track or from the loading depot?

A. Approximately five.

Q. Five blocks. How many trips were made from the loading depot, from the warehouse 1045 to the loading depot?

A. Approximately five, four or five.

Q. Five trips?

A. Four or five. I am not sure.

Q. And how long did it take?

A. Oh, about four thirty to about six o'clock, five thirty or six.

Q. Did you operate with a small or large truck?

A. Small. [140]

Q. Small truck. By small can you give us an idea of the size, half ton? A. Ton and a half.

Q. Now this stuff was loose or tightly packed?

A. It was packed in cartons.

Q. At that time, Mr. Lieutenant Apperson, while this process of loading the car took place, Mr. Schneider had not yet paid for any of the merchandise?

A. No. However, I presume they continued loading while they were loading the scrap.

(Testimony of Lt. Harvey B. Apperson.)

Q. You were with him all the time?

A. With the exception of the few minutes I left.

Q. Do you know whether he paid for that scrap during that one half hour period?

A. He did pay for the scrap. He didn't have that until later.

Q. In other words, he didn't pay until an hour or hour and a half later?

A. He paid for the scrap.

Q. Before the loading took place?

A. I presume it went on while he was paying for it.

Q. Before he paid for it?

A. We loaded the stuff from 1045.

Q. Is it customary and usual and part of the contract for any merchandise to be loaded on a truck and into a car without having the stuff paid for?

Mr. Angland: To which we object, your Honor. The contract speaks for itself.

The Court: I will sustain the objection.

Q. Well, you are familiar with the terms of the contract, aren't you? A. Yes.

Q. And isn't it the fact that a contract says that you are supposed to pay for merchandise before you are entitled to have it loaded?

Mr. Angland: Just a minute. Same objection. The contract speaks for itself.

The Court: Sustain the objection.

Mr. Leibowitz: I think I have a right, your Honor, to show there was violation of the rules and

(Testimony of Lt. Harvey B. Apperson.)

regulations and a departure from the contract in order to show——

The Court: All right, get the contract and see what the rule is and call it to his attention.

Mr. Leibowitz: Well, he did say—all right.

Witness: Your Honor, I might be able to clear this point in spite of the fact——

Mr. Leibowitz: Wait a minute; don't volunteer.

Q. I call your attention to paragraph 7 of the contract and ask you what it says with reference to the payment of the merchandise?

A. I am quite familiar with this paragraph.

Q. All right, now isn't it true that before any loading can be taking place the merchandise must be paid for? [142]

A. I will clear this point this way. The track-age that this railroad car is sent on is on Government property and the whole railroad car would have to be removed before you would consider your property being removed.

Q. I don't understand that answer. I just want to know if you, as a man can come along and take the merchandise away and not pay for it yet?

A. No, he can't.

Q. But they permitted him to remove the merchandise from the warehouse and place it on his truck without first going into the office and paying for it? A. No.

Q. They would have to first see his money to find out if he used money to pay for it, isn't that true? A. Correct.

(Testimony of Lt. Harvey B. Apperson.)

Q. But that wasn't done in this case, was it?

A. He paid for it before he removed the scrap.

Q. I didn't ask you that question. I am only talking about the stuff that come out of 1045?

A. No, he didn't pay for it.

Q. But notwithstanding the fact that he didn't pay for it you removed it from the warehouse, loaded the truck and put it right on the car, didn't you? That is a fact?

A. I removed it from the warehouse and put it on the railroad car?

Q. Without having Mr. Schneider pay for it?

A. That is right. [143]

Q. And there was no request on your part to go to the office and pay for this particular merchandise, was there? A. No.

Q. Now during this entire period while these things were being done the F.B.I. were right in around there?

A. I presume they had me under surveillance.

Q. Were there any officers there in that point at that time? A. None other than myself.

Q. No one but yourself? A. That is right.

Q. Now, Lieutenant Apperson, after you reported to I think it was Captain—do you recall the man's name? Lextern or something like that? He was the man who was in charge of—how do you pronounce the name, Brynildson?

A. Brynildson.

Q. He was the first man you reported the con-

(Testimony of Lt. Harvey B. Apperson.)

versation to that you had with Mr. Schneider?

A. That is right.

Q. And immediately following that conversation he called in the F.B.I., is that true?

A. That is correct.

Q. And after the F.B.I. had come on to the Airbase and discussed the matter with you and the Captain, did you then get in touch with Mr. Lamb, or was Mr. Lamb called in?

A. I don't know. We contacted and had a conversation with the F.B.I. here, not on the Base, and, of course, what he did I couldn't say.

Q. What Mr. Matthews did, you don't know?

A. I presume he contacted Mr. Lamb.

Q. You had nothing to do with the contacting of Mr. Lamb? A. No.

Q. At that time your Commanding Officer knew nothing about it, did he?

A. Well, he knew we were selling the scrap.

Q. I didn't ask you that. He knew nothing about this business? A. Not right that minute, no.

Q. Not at the time the F.B.I. was called in, is that so? A. No, he didn't know.

Q. Well, did you report this thing to the Commanding Officer, Mr. Lieutenant Apperson?

A. With Mr. Matthews, Captain Brynildson and the Staff Judge Advocate; all three of us reported it.

Q. That is after the F.B.I. came in?

A. That is right.

Q. You had your discussion and you decided to

(Testimony of Lt. Harvey B. Apperson.)

go and report the facts to the Commanding Officer?

A. That is correct.

Q. And that was General Chennault?

A. Colonel Chennault.

Q. Before you procured or before you reported the facts to the Colonel did any of the F.B.I. or Mr. Matthews suggest to you that the plan should be laid to catch or entrap Mr. Schneider?

A. No, they indicated to me just to go along and keep my mouth shut. [145]

Q. Yes.

A. And see what he would do; let him make all the ovations.

Q. But you didn't keep your mouth shut, did you? A. Well, you have to answer yes or no.

Q. Then you went further than that, you went to see your Colonel, didn't you? A. Of course.

Q. Well, were you afraid that you couldn't do those things unless you had permission of the Colonel to do it?

A. No, I wasn't afraid. I felt I went to the Colonel as a courtesy.

Q. Well, did you feel you might violate some rule or regulation if you didn't take the Colonel into your confidence?

A. I am not in the habit of taking bribes.

Q. I haven't asked you that.

A. And I wanted to explain to the Colonel. You asked me why I went to see the Colonel.

Q. Yes, I want to know if there is a specific rule

(Testimony of Lt. Harvey B. Apperson.)

or regulation that prohibits you from going along on a scheme of this sort unless you reported the thing to the Colonel to perform something illegal?

A. Theoretically the Colonel is supposed to know everything I do.

Q. I haven't asked you whether theoretically he is supposed to know. I asked you if there was any rule or regulation you felt you might violate if you went along with Mr. Matthews [146] unless you reported that fact to the Colonel?

A. No, I can't think of anything I would have. I didn't feel that way at the time I was violating any.

Q. In other words, it would have been a common thing if he had put the merchandise into the trucks and didn't pay for it, have Mr. Schneider pay for the merchandise? A. No.

Q. On your own? A. Of course not.

Q. In other words, you would have to obtain some sort of consent?

A. I wanted them to know exactly what I was doing.

Q. The Colonel?

A. The Colonel and the F.B.I.

Q. The F.B.I. knew. I am referring to the Colonel.

A. I will explain another reason why it was necessary they knew.

Q. Go ahead and explain.

A. That area is guarded and those guards are armed. I have to explain why and the reason I am down there after dark.

(Testimony of Lt. Harvey B. Apperson.)

Q. Then there was a restriction against the use of a certain area? A. Not a restriction.

Q. After certain hours?

A. Not a restriction if you have a legitimate reason.

Q. Legitimate purpose—but you had no legitimate purpose?

A. I had a legitimate purpose in that I was loading the scrap he purchased. [147]

Q. That wasn't the only reason that you have. Well, the scrap would not have taken that much longer? I will withdraw that question. You wouldn't have permitted Mr. Schneider to take the scrap away unless he had brought a truck from Great Falls and hire his men and had that stuff removed, isn't that so?

A. It depends on circumstances. I hadn't planned to.

The Court: You have gone all over that.

Mr. Leibowitz: I just want to show this.

Q. And that was only because you wanted to catch Mr. Schneider? A. No.

Q. And taken——

A. Wait until I get through.

Q. ——the merchandise out of 1045 that you were willing to have the regulations violated?

A. No. Mr. Schneider's bid had been high enough that a little use of a Government truck wouldn't have cost the Government too much. I used that because labor was difficult at that time to

(Testimony of Lt. Harvey B. Apperson.)

obtain in Great Falls, and a truck would have been difficult. Mr. Schneider would have had to pay the truck to come to the base and all and go back to the base.

Q. You would have furnished a Government truck for that purpose? A. In this case, yes.

Q. But you wouldn't have furnished any Government labor?

A. I couldn't furnish Government labor. [148]

Q. But he would still have to go to Great Falls and pick up the labor?

A. I couldn't have obtained it there.

Q. Then he would have to go to Great Falls and pick it up? A. That is right.

Q. Now, after you reported to Colonel Chennault, he issued an order, didn't he, permitting you to go ahead and co-operate?

A. He gave me a letter.

Q. Have you the letter here?

A. No, I do not have it right here, no.

Q. Did you turn in that letter to Mr. Matthews?

A. I presume Mr. Matthews has a copy of it.

Q. May I have the letter, please?

A. I can get the letter in twenty minutes if necessary.

Mr. Leibowitz: They say they haven't got it. You say they have a copy of it. May I have it, please?

Mr. Lamb: Mr. Matthews now advises counsel, Mr. Leibowitz, he doesn't have the letter in question.

(Testimony of Lt. Harvey B. Apperson.)

Q. Well, will you bring that letter in twenty minutes or after you get through? You have it, haven't you?

A. I can either get the original or a copy. Captain Brynildson has a copy, I am sure.

Q. Well, before you get the letter can you tell us in substance what it says?

A. Oh, it says I was to co-operate with the F.B.I. any [149] way they saw fit.

Q. And was there anything else?

A. Not that I can remember offhand, no.

Q. Was it a long letter? A. About a page.

Q. One page, addressed to your personally?

A. Yes.

Q. And you felt with that letter it furnished you with protection for what you were doing?

A. That is right.

Q. Did you request that letter? A. Yes.

Q. Now, Lieutenant Apperson, after the stuff was loaded on the car from the warehouse 1045 the balance of the scrap wasn't loaded yet, was it?

A. There wasn't any scrap loaded.

Q. No scrap loaded at all?

A. Until this material was removed from 1045.

Q. And did you see that all the stuff from 1045 had been loaded?

A. I didn't see. I more or less watched it being removed.

Q. Then there reached a point when you and Mr. Schneider went into the office for the purpose

(Testimony of Lt. Harvey B. Apperson.)

of having Mr. Schneider pay for the merchandise,
for the scrap? A. For the scrap.

Q. Is that true? A. Yes.

Q. And you accompanied him there?

A. That is right.

Q. And you saw him pay, did you? A. Yes.

Q. He had a series of certified checks, didn't he?

A. Yes. [150]

Q. Each check was in round figures, sort of?

A. Yes.

Q. Now, there was a balance due him, wasn't there? In other words, he had given the Government say half a dozen checks and there was a small amount due him, if you recall?

A. They were in round numbers if I remember correctly and he had, there was some change made, yes.

Q. There was some change made? A. Yes.

Q. In other words, he had paid a few dollars more? A. Yes, if I remember correctly.

Q. And did you see if the change was paid to him?

A. If I remember correctly the proper amount of change was given to him.

Q. Cash? A. Yes.

Q. Is that customary, Lieutenant Apperson, for the Government to pay back in cash for if any monies was paid, checks were given in excess of the amount due the Government?

A. There has to be some way of making change.

(Testimony of Lt. Harvey B. Apperson.)

Q. Well, from your own—have you had any experience along those lines? A. No.

Q. Isn't it a fact, Mr. Lieutenant Apperson, that at no time may the Government or any person acting in behalf of the Government ever make change?

Mr. Lamb: To which we object, your Honor, as being highly irrelevant and immaterial.

The Court: He says he don't, he hasn't had [151] any experience; how can he answer that question?

Witness: I can, sir. Many times change is made at the commissary, post exchange, barber shop.

Q. (By Mr. Leibowitz): I didn't ask you that. It is not responsive. I asked him with reference to a contract for the purchase or sale of merchandise.

A. If you are to be that specific, I don't know.

Q. Do you know of any rules or regulations governing that?

A. Not as far as contracts. If you are being that specific, no.

Q. Don't you know, Mr. Lieutenant Apperson, that if there is one cent coming to the purchaser, that cent is refunded by way of a Government voucher?

Mr. Lamb: To which we object as being repetition.

The Court: Sustain the objection.

Mr. Leibowitz: I don't know the grounds of the objection if he made a ground.

Mr. Lamb: Repetition. The objection has already been sustained.

(Testimony of Lt. Harvey B. Apperson.)

The Court: It has been gone over two or three times.

Q. Now after he paid for the merchandise that he had purchased you then left the Airbase, didn't you? A. An hour or so later, yes.

Q. I beg your pardon. [152]

A. An hour or so later, yes.

Q. And you went into town into the city of Great Falls, didn't you? A. That is correct.

Q. And then you went into a Bar Grill?

A. That is right, a bar.

Q. And you had some drinks, did you?

A. That is correct.

Q. Did the F.B.I. furnish any money for you——

A. No.

Q. To entertain Mr. Schneider?

A. No, Mr. Schneider entertained.

Q. Mr. Schneider what?

A. Mr. Schneider bought the drinks.

Q. He bought them but your going into the bar was something that was pre-arranged with Mr. Matthews, wasn't it?

A. I told Mr. Matthews we would go down town.

Q. And he said it was all right? A. Yes.

Q. And as far as you know he followed you?

A. I don't know. I presume so.

Q. Well—— A. I presume so.

Q. And I understand that after you were in the bar for a few moments you went into the men's room, didn't you? A. That is right.

(Testimony of Lt. Harvey B. Apperson.)

Q. Was that done by pre-arrangement with Mr. Matthews [153] that you should go into the men's room? A. I was to be searched, yes.

Q. And that is the reason you went into the men's room? A. Possibly, yes.

Q. But that was done by pre-arrangement with Mr. Matthews?

A. Not going directly into the men's room, no.

Q. Well, at least to be away from the public?

A. Yes.

Q. And the only place you could think of was downstairs or upstairs—I don't know where it is—is in the men's room? A. Yes.

Q. Mr. Matthews followed you immediately after you left Mr. Schneider and went into the men's room, didn't he? A. Yes.

Q. And you were searched there, weren't you?

A. Yes.

Q. You went upstairs after that, did you, back into the dining room?

A. I went back into the bar.

Q. In the bar and you continued to have drinks, did you?

A. I think we finished one of the drinks we started.

Q. And then you just picked yourself up and went outside? A. That is right.

Q. You arranged to go into Mr. Schneider's room?

A. That is right. I didn't arrange.

(Testimony of Lt. Harvey B. Apperson.)

Q. I beg your pardon.

A. It was at his suggestion.

Q. At his suggestion but you had arranged in advance [154] that you were going to get paid what at his room? A. No, not exactly.

Q. Well, did Mr. Matthews tell you the most appropriate place for payment would be in his room? A. No.

Q. He didn't? A. No.

Q. Well, did you request Mr. Schneider to pay you right at the bar?

A. I suggested that we settle up.

Q. Right at the bar?

A. Yes, I think I did there at the bar.

Q. But Mr. Schneider suggested that you had better after you people went to his room?

A. That is right.

Q. And you did go into his room?

A. That is right.

Q. Did Mr. Matthews tell you how long you should stay in his room? A. No.

Q. Did Mr. Matthews tell you just as soon as you got some to make your departure quickly?

A. I don't think that was discussed at all.

Q. Did Mr. Matthews tell you you should ask for an envelope? A. No.

Q. He didn't? A. No.

Q. That suggestion came from you, did it?

A. I suggested it. As a matter of fact the thought came just at that time.

(Testimony of Lt. Harvey B. Apperson.)

Q. Came from you? A. Yes. [155]

Q. Now, how long did you spend in Mr. Schneider's room?

A. Oh, maybe fifteen minutes, maybe forty-five. I am not sure. I didn't check it.

Q. And during that time Mr. Schneider showed you certain courtesies by giving you drinks, didn't he? A. He gave me a drink?

Q. And you liked it and asked for some more?

A. I think I did ask for another but I am not sure.

Q. But you knew at that time he was going to be locked up very quickly, didn't you?

A. I presume so, yes.

Q. Now, after the money was given to you—well, I withdraw that. Mr. Schneider offered you first, you said—well, you used the expression “quid.” Let's understand what that means. What does quid mean? A. I don't know.

Q. You don't know?

A. I don't have any idea what a quid means. Two or three people since then have suggested meanings, but that was the first time I ever heard that expression.

Q. Well, you didn't know when the word “quid” was used whether it meant a lot of money or something else?

A. Well, I was pretty sure because he said “a couple of G's” right after that.

Q. All right, what did they say about a quid?

(Testimony of Lt. Harvey B. Apperson.)

A. He didn't say it at the time. Some people say a quid is English money. I am not sure.

Q. Let's see, it might be worth how much? I want to get an idea what it is worth. It is less than \$2,000 any way, we agree on that? A. Yes.

Q. Now, he first offered you how much money, Mr. Lieutenant Apperson?

A. Well, he said: "Half a quid to a couple G's."

Q. Well, then he sort of handed you some money, didn't he? A. In the room, yes.

Q. And how much money was that the first time he handed you some money and you expressed an opinion, or well you thought it was unfair how much he gave you? A. He didn't hand me.

Q. He counted off a certain amount of money?

A. I don't remember him counting off anything. He said he would give me \$1400.

Q. That was the first mention of amount at that moment?

A. Of any specific amount. He said he would give me half a quid up to a couple of G's the day before, and this was, this time he said I will give you fourteen, thirteen or fourteen.

Q. But you asked him for a little more, didn't you?

A. No, I did not. I didn't ask him for anything.

Q. You didn't quibble for anything, did you?

A. No. [157]

Q. Isn't it a fact at first he offered you \$1,000;

(Testimony of Lt. Harvey B. Apperson.)

first gave you \$1,000, and you said that wasn't enough? A. No.

Q. You didn't say that to him? A. No.

Q. Well, after the payment was made, Mr. Apperson, you left, didn't you?

A. Yes, that is right.

Q. And you went downstairs and saw Mr. Matthews? A. That is right.

Q. Did you give him the money right then and there? A. Yes.

Q. And then you left?

A. Yes, I went into the bar.

Q. You went where?

A. I went into the men's room with Mr. Leonard and he searched me.

Q. Did they say why they were searching you?

A. No, I presume, I thought——

Q. Well, tell us why?

A. To find out if I had kept any of the money Schneider gave me.

Q. All right, did Mr. Matthews ask you how much did he actually give you?

A. Oh, I don't think he did. I don't remember. I think I handed it to him.

Q. And said: "That is the money"? [158]

A. I think I just handed it to him and said: "Room 340."

Q. Did you tell him all the money given to you by Mr. Schneider is contained in the envelope?

A. I didn't say one way or another.

(Testimony of Lt. Harvey B. Apperson.)

Q. Pardon.

A. I didn't say one way or another.

Q. Where was Mr. Leonard?

A. I presume he was in the lobby.

Q. In the same hotel? A. Yes.

Q. Did Mr. Leonard walk over to you and ask you to come downstairs?

A. Well, we didn't go downstairs. He walked up to me.

Q. In other words, he didn't take your word for it, he made a search?

A. He said he would like to search me.

Mr. Leibowitz: May I have a few moments? I just want to consult counsel and collect my thoughts.

The Court: We will take a recess for ten minutes and you will get an opportunity to consult with counsel. (9:45 a.m.)

Court resumed, pursuant to recess, at 10:55 a.m., at which time the jury, defendant, and all counsel were present.

The Court: Gentlemen, you may proceed. [159]

Cross-Examination

(Continued)

By Mr. Leibowitz:

Q. Lieutenant Apperson, did you obtain that letter from the Captain?

A. Beg your pardon.

Q. Did you obtain the letter you said you might

(Testimony of Lt. Harvey B. Apperson.)

from the Captain out in the hall? Is that the man you were talking about had the letter?

A. No, I didn't obtain it.

Mr. Lamb: I have it.

Mr. Leibowitz: May I have that, please?

Mr. Lamb: Yes. There are two letters.

Mr. Leibowitz: I am perfectly willing to have these letters go in evidence.

Mr. Lamb: Just have them marked.

Q. (By Mr. Leibowitz): Now I show you Defendant's Exhibit 9 and ask you if that is the letter that Colonel Chennault gave you, a copy of the letter, anyway?

A. That is the letter to the best of my knowledge.

Q. Now is there another letter he had given you?

A. I have a copy of the letter Mr. Matthews wrote to Colonel Chennault.

Q. Yes, but have you another letter from Colonel Chennault? A. This is the only one.

Q. Now I show you Defendant's Exhibit 10 and ask you [160] if this is a copy of the letter Mr. Matthews had written to Colonel Chennault.

A. That is the letter.

Mr. Leibowitz: May I be permitted to read those letters to the jury?

The Court: Just a minute. Do you agree to it?

Mr. Lamb: He hasn't offered them?

Mr. Leibowitz: I don't know the procedure. I offer them in evidence.

(Testimony of Lt. Harvey B. Apperson.)

The Court: You offer them in evidence, Exhibits 7 and 8; and you have no objection?

Mr. Lamb: I have no objection.

The Court: Very well, they are received in evidence. The exhibits should be marked 8 and 9.

(Whereupon said Defendant's Exhibits Nos. 8 and 9, offered and received in evidence, are a part of this record.)

(Whereupon Mr. Leibowitz read Defendant's Exhibits Nos. 8 and 9 to the jury.)

Q. (By Mr. Leibowitz): Now, Lieutenant, in addition to enlisting the aid of or getting the consent of the Colonel you also stated that you went to the Provost Marshal, I think?

A. No, I went to the Wing Staff Judge Advocate.

Q. Beg your pardon.

A. I went to the Wing Staff Judge Advocate.

Q. And is he some legal officer attached to the Base? A. That is correct.

Q. And did you see him before you had gone over to see the Colonel? A. Yes.

Q. Was he the man that referred you to the Colonel? A. Yes.

Q. Did you tell him that you would like to do those things?

A. I told him I would co-operate in any way that the F.B.I. saw fit.

Q. Well, he didn't tell you to go ahead, did he?

A. Well, he didn't have the authority.

(Testimony of Lt. Harvey B. Apperson.)

Q. And you didn't have the authority to go ahead if he didn't? A. Well, of course, not.

Q. And then following that, of course, you went to the Colonel and got the permission?

A. Yes.

Q. Now you stated that some time in November, 15th, or 18th, or 16th, you put in a telephone call to New York City? A. That is right.

Q. And you reversed the charge, didn't you?

A. That is right.

Q. Did you use the telephone in Lieutenant Green's office? A. I used my own.

Q. You used your own telephone?

A. At my office.

Q. In your office? Is that a pay telephone? [162]

A. No, it is a Government telephone.

Q. You just picked up the telephone and asked for the operator, did you?

A. We have our own operator. I called the operator and told her I wanted to put in a long distance telephone call to New York.

Q. You are sure that is what you did?

A. Yes.

Q. And that record—does the girl at the office make a notation of that fact?

A. I don't know. I do not think so. Yes, but I am not sure.

Q. Now, Mr. Lieutenant Apperson, isn't it a fact that you didn't use your own telephone at the time you made the telephone call to New York City and called Mr. Schneider?

(Testimony of Lt. Harvey B. Apperson.)

A. Did you say that I didn't?

Q. You didn't use your telephone?

A. I used the telephone at the Base, the salvage office.

Q. And that was the telephone that you used to make that telephone call?

A. I said I just made that telephone call a collect call to New York.

Q. And that was the telephone you used?

A. I don't know whether it is the same instrument or not.

Q. Well, isn't it a fact, Lieutenant, that you used a pay station telephone to make that telephone call?

A. I did not.

Q. Well, I will give you the telephone number. The telephone number is Great Falls 9795. You don't recall that, do you? Would you say that you didn't use that telephone to make that telephone call to New York City?

A. Not that I recall, no.

Q. You didn't make two telephone calls to New York City, did you?

A. I made one collect telephone call to New York City.

Q. And isn't it a fact, Lieutenant Apperson, when you used that telephone you told Mr. Schneider "You should come up here"?

A. I told Mr. Schneider he would have to arrange—he had previously told me he would come to Great Falls, and I told him he better come and get

(Testimony of Lt. Harvey B. Apperson.)

his stuff or I would send out a registered letter of forfeiture.

Q. But you wanted him up here, didn't you?

A. It was immaterial to me whether he came or not.

Q. You tried to impress on him that he would have to make arrangements to be here?

A. I told him he would have to make arrangements to remove the salvage he purchased.

Q. Well, were you very much concerned about Mr. Schneider performing his contract?

A. I was because I needed the warehouse space.

Q. Well, you had a contract which you can enforce with the Government if he didn't show up?

A. I felt in fairness to him why should I be hard-boiled and make him lose his deposit. I felt in fairness to him that it was possible he didn't understand the contract.

Q. You know, Lieutenant Apperson, you felt the price was pretty high?

A. I said I felt it was a very good return to the Government, and it is.

Q. Were you concerned about the Government losing the benefit of a good price like that?

A. They wouldn't lose the benefit of the sale and he would have lost his.

Q. That is right.

A. And he could have been charged whatever it cost the Government to remove that and re-sell it.

Q. In your experience attached to this office had

(Testimony of Lt. Harvey B. Apperson.)

you ever made a telephone call long distance or otherwise requiring people to come and call for their merchandise?

The Court: That is not a proper question. It is not based on testimony. This isn't a question of coming and removing it. Be fair with this witness.

Mr. Leibowitz: I certainly am very fair with him.

Q. Do you deny, Mr. Lieutenant Apperson, that you didn't use the telephone at your office but used a pay station [165] telephone?

Mr. Lamb: We object to that on the ground it is repetition.

The Court: Repetitious. Sustain the objection.

Q. Do you know how much the telephone bill was for that call? A. No.

Q. Do you know how long you spoke to the man on the telephone? A. No.

Q. That telephone call was placed you recall on the 15th day of November, 1948?

A. I presume the 15th.

Q. And it cost \$5.10 to make that telephone call?

A. I don't know how much it cost.

Q. Mr. Lieutenant Apperson, when did you make that telephone call, in the morning or in the afternoon or in the evening?

A. I don't exactly remember.

Q. Well, would you say it was during business hours you made it?

A. It was during business hours.

Q. It was during business hours?

(Testimony of Lt. Harvey B. Apperson.)

A. It was during business hours.

Q. Can you recall whether it was in the morning or afternoon? A. I don't recall.

Q. Well, perhaps I will show you a letter from the New York Telephone Company addressed to Mr. M. Schneider, 269 Cherry Street, New York, and I am going to ask you to [166] read the letter and tell us if it refreshes your recollection as to whether or not you put a long distance telephone call in from a dial station from Great Falls?

The Court: Before you answer that question let that letter be shown to counsel.

Mr. Leibowitz: Oh, yes. Don't answer it.

Mr. Leibowitz: Is it all right now, your Honor?

The Court: Yes.

Q. Now, the question is does that letter refresh your recollection?

A. I remember putting in a collect telephone call to Mr. Schneider but I am sure I put it in at my office.

Q. Is your office telephone number the same telephone number that appears there, Great Falls——

A. I can't remember the extension number but the Base telephone number is 7651.

Q. Is that the telephone number that appears on that?

A. The only thing that appears here is Spring——

Q. No, number? This number?

A. That is 9795.

(Testimony of Lt. Harvey B. Apperson.)

Q. Great Falls? A. I presume. Yes.

Q. That isn't the Base telephone number?

A. No.

Q. Now, is there a telephone booth at the Air-base? A. There are quite a few, yes.

Q. Does it bear the number Great Falls or would it bear [167] some other exchange?

A. I would presume it would bear Great Falls.

Q. You presume so, do you know or don't you know? A. Yes, I presume so.

Q. You know that?

A. I don't know. This isn't my name on this anyway.

Q. Well, what name appears?

A. Alberson.

Q. Well, are you quibbling that you are not the individual?

A. I don't know whether I am or not. This is new to me.

Mr. Leibowitz: I will offer this letter in evidence.

Mr. Angland: It is objected to, no proper foundation and it hasn't been marked.

Mr. Leibowitz: In New York we mark it for identification and then offer it.

The Court: Mark it for identification. He doesn't know anything about this letter. That is my understanding of your answer, is that right?

Witness: Yes.

Mr. Angland: No proper foundation.

The Court: I don't think so either. I think you

(Testimony of Lt. Harvey B. Apperson.)

ought to have somebody offer some substantial testimony as to where this letter came from and who wrote it.

Mr. Eickemeyer: If the Court please, it seems to me Mr. Leibowitz would have the right to ask a question [168] direct of this witness for impeaching purposes as to whether or not, on that day as to whether or not on the 15th day of November, 1948, as to whether or not he made a call to Meyer Schneider collect to his phone number Spring 7-2780, and as to whether or not that call was not started at 10:47 a.m. and lasted six minutes, and as to whether or not that call was made from some Great Falls phone No. 9795. Now he can answer that question then yes or no and we have a right to go into the matter later.

The Court: He already answered it two or three times, and has gone over it in his examination of this witness, and now you ask permission to ask direct the one question?

Mr. Eickemeyer: Including all of this information.

The Court: With the numbers?

Mr. Eickemeyer: Yes.

The Court: On there?

Mr. Eickemeyer: Yes.

The Court: Well, you may ask him the question if he knows. Did you hear and understand the question?

A. Yes, sir. I made a telephone call to Schneider

(Testimony of Lt. Harvey B. Apperson.)

from my office collect. As to the time of it I can't exactly remember.

The Court: You don't remember the time?

A. No. [169]

The Court: Where did you make it?

A. From the salvage office.

The Court: From your office? A. Yes.

The Court: Salvage office? A. Yes.

The Court: He has answered it.

Mr. Eickemeyer: Now, if the Court please, it is very difficult for anyone to get information from the telephone company. Now I would request on the part of the defendant that Lieutenant Apperson get from the Army Airbase if there is a record of that call he claims he made, and if there is no record and the Army can get this information from the telephone company from that call, and there would be a record in Great Falls. You understand, if the Court please, if it is a reverse call from a telephone call the records are all in New York and we can't get them.

Mr. Lamb: Mr. Eickemeyer, if that is what you are looking for, I will gladly furnish you with the Army records.

The Court: Do I understand that is the Army record of the phone.

Mr. Lamb: That is correct, your Honor.

Mr. Eickemeyer: That is on the 16th.

Mr. Lamb: At this time we will have this particular exhibit marked. The witness has been re-

(Testimony of Lt. Harvey B. Apperson.)

quested to [170] furnish that record of the long distance phone call from his extension to Meyer Schneider, and we are now asking that Army record be offered as Plaintiff's Exhibit 11, and we now offer it.

Mr. Leibowitz: That is your case; that is not our case.

Mr. Lamb: You asked us to furnish it and we are furnishing.

Mr. Leibowitz: You don't have to identify it first that is the telephone call? We have a letter from the New York Telephone Company as to this.

Mr. Lamb: We are merely acceding to the request of your co-counsel. You asked us to furnish you with the Government record and we have now furnished you with it.

The Court: All right, either accept it or object to it. That is what you called for.

Mr. Eickemeyer: As I understand it—are you offering this now?

Mr. Lamb: Yes, that is correct.

Mr. Eickemeyer: Well to this exhibit, Plaintiff's 11, the defendant objects upon the ground and for the reason that it is incompetent, irrelevant and immaterial and no proper foundation having been made. We don't know who made this, these notations, or where it came from, and there certainly isn't any foundation laid for the introduction of this [171] as an exhibit at this time. Just because they say it is a record that doesn't make it admissible.

(Testimony of Lt. Harvey B. Apperson.)

The Court: Yes. The same objection would be made to the letter.

Mr. Leibowitz: Of course, that isn't a letter from the telephone company.

The Court: Can you identify this?

Mr. Lamb: Yes.

The Court: All right, I will sustain your objection for the present. He says he can identify it and prove it. Now with that very same objection Mr. Eickemeyer made here I will overrule the introduction of that letter.

Mr. Eickemeyer: The letter from the company?

The Court: Yes.

Mr. Eickemeyer: If the Court please, we take exception to the Court's ruling because the——

The Court: All right, state your objection.

Mr. Eickemeyer: Upon the ground and for the reason it has already been admitted into evidence and upon the ground and for the reason that the Government has consented that the letter be introduced and made no objection to it.

Mr. Angland: No such consent.

The Court: What letter are you talking about?

Mr. Eickemeyer: Oh, I am—I beg your pardon.

The Court: Sure, you are mistaken. Go ahead, let's get going. [172]

Q. (By Mr. Leibowitz): Lieutenant Apperson, can you tell us how many pounds of merchandise that stuff from the 1045 warehouse weighed?

A. I would make a rough guess but I wouldn't guess within five or six hundred pounds.

(Testimony of Lt. Harvey B. Apperson.)

Q. That is all right.

A. I could guess maybe 1,000 pounds.

Q. How much?

A. Maybe 1,000 pounds but I don't know.

Q. 1,000 pounds?

A. That is a very wild guess.

Q. Now that is the stuff which you were talking about is worth \$8,000, is it not?

A. It cost the Government \$36,000.

Q. I am not asking you how much it cost the Government. You said——

A. It might be worth \$50,000 to you and it might be worth five to me.

Mr. Leibowitz: I move to strike out those answers, your Honor. They are not responsive.

The Court: Well, the latter part of it is not responsive.

Q. I asked you—Lieutenant Apperson, you found out that they were sold to the public for \$8,000? A. That is what I understand. [173]

Q. You understand the 1,000 pounds of merchandise was \$8,000, so you understand?

A. Well, if you figure it that way, but really I say again I don't know how much it weighed.

Q. Now isn't it a fact, Lieutenant Apperson, that that stuff wasn't worth \$2,000?

A. I don't know.

Q. Well, you were the Airbase salvage officer?

A. I would say it was worth considerably more than \$8,000.

(Testimony of Lt. Harvey B. Apperson.)

Q. Well, do you have a record of those items in your office? A. Yes.

Q. With its prices? A. Yes.

Q. And you have computed that to run to over \$8,000?

A. The record I have amounts to \$36,000. I keep a record of how much the Government purchased it for. I presume that is how much they purchased it for.

Q. Now, Lieutenant Apperson, well have you got the record how much it cost the Government on the scrap material? A. In some cases, yes.

Q. Well, that was Government stuff, wasn't it? A. Yes.

Q. How much did that amount to?

A. I don't know.

Q. Approximately?

A. I wouldn't make a guess.

Q. Now, you have testified there was a lot of abandoned material you just threw in a heap around the place? A. That is right. [174]

Q. Have you got a record how much that cost the Government? A. No.

Q. Originally? A. No.

Q. Why that may have cost the Government one million dollars, maybe?

A. An abandoned piece of property might be a crashed aircraft.

Q. That is true, and that might cost the Government over a million dollars?

(Testimony of Lt. Harvey B. Apperson.)

A. That is right, it might.

Q. Now, Lieutenant, you knew that when you loaded the car from there, got the merchandise out of warehouse 1045, that there wasn't the slightest chance for Mr. Schneider ever to take over this merchandise? You knew that, didn't you?

A. When we loaded it, yes, I knew he couldn't take it away.

Q. As a matter of fact you knew it wouldn't be moved even? A. That is correct.

Q. That was just merely an act, a form you had to go through, isn't that so? It was an arrangement you had with the F.B.I.?

A. Well, I loaded it, yes.

Q. That was the procedure that was arranged that you followed? A. Yes.

Q. You certainly didn't expect Mr. Schneider to have [175] any money if the stuff remained in the warehouse at 1045? A. No.

Q. So you had to have it loaded, isn't that it?

A. Yes.

Q. Now, immediately after it was loaded and you went away from the Base when was that stuff unloaded?

A. It was unloaded the next afternoon.

Q. The next afternoon—was the scrap material already inside the car? A. Yes.

Q. Lieutenant Apperson, did you have the right or the authority after the stuff was in the car to send it off to Mr. Schneider?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes, I could have sent it off to him.

Q. Without violating any rule and regulation?

A. No.

Q. Without having been——

A. I wouldn't have sent the good stuff to him, no.

Q. Of course you wouldn't. I just asked you if you had the right to send that stuff through without any permission from anybody to Mr. Schneider in the very form that it was put on and the very manner that it was put on?

A. Yes, I could have sent it to him.

Q. Without getting paid for the merchandise?

A. Well, I had better explain a little. I am responsible for that equipment. If I had sent it to Mr. Schneider, I would have had to pay for it myself. [176]

Q. You would be responsible to whom?

A. To the United States Government.

Q. You mean a financial responsibility only?

A. That is right.

Q. And that is the only responsibility?

A. That is right.

Q. As long as you paid for the merchandise you would have been absolved from any responsibility?

A. I would have had to pay for the amount it cost the Government. That is what we call pecuniary liability.

Q. You would have to pay the \$36,000?

A. I presume so.

Q. And that is all?

A. I presume so.

(Testimony of Lt. Harvey B. Apperson.)

Q. No one could be reproached for it?

A. I imagine they would. I don't know——

Q. I beg your pardon.

A. I imagine they would want to know why I sent it to him and was that big a fool.

Q. And that is all, just why?

A. I presume. I have never done it before. I don't know.

Q. I haven't asked you whether you done it or not. I know you didn't. A. I don't know.

Q. Now, you said you were familiar with a manual, didn't you? A. That is correct. [177]

Q. Well, is there any manual which gives you the right to send the merchandise through to New York City as in this case? A. No.

Q. Without getting paid for it and without asking anybody's permission? A. No.

Q. As a matter of fact there isn't any such, you couldn't find any such permission in there, could you?

A. No. I am guessing that. I have never done this before so I don't know.

Q. In other words, you wouldn't last a minute if you ever took stuff right out of that warehouse?

A. That is right.

Q. Without the permission of somebody in authority? A. That is correct.

Q. And put it on that car and send it off; even if you were paid for the merchandise, you couldn't do it?

A. I don't know. All I know is I am responsible for a certain amount of Government property.

(Testimony of Lt. Harvey B. Apperson.)

Q. As a matter of fact if you were able to get a million dollars for stuff worth ten thousand dollars, you couldn't get that stuff or send it off?

A. That is correct.

Q. It would have to go through a certain amount of red tape? A. I have in other cases.

Q. I haven't asked you in other cases.

Mr. Lamb: Let him answer. [178]

A. I am trying to explain something.

The Court: Treat this witness fairly. Don't argue and argue and go over and over again. Let's get through sometime.

A. I can ship other salvage material to any other base by request of another flight officer or another salvage officer, and I can ship him anything I feel he should be on requisition.

Q. I don't question it, but while you are doing that it is still Army property?

A. I don't know whether I could ship him this stuff. I wouldn't. I will put it that way.

Q. You would not what?

A. I wouldn't ship it to him without being paid for it. Does that answer your question?

Q. I will go further. Would you ship it to him even if you got paid one hundred thousand dollars?

A. No, not if I were paid one hundred thousand dollars.

Q. I mean if you turned in the returns in to the Government? I am not saying you personally.

The Court: You have no right to argue with this witness; and treat him fairly.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Leibowitz: I am certainly trying to.

Q. Now if you received a hundred dollars as an individual from Mr. Schneider for stuff worth a maximum to the Government [179] of \$36,000, and you take that check and turned it into the Government, would you be permitted to accept it in that form?

A. I understand what you are getting at. I can't make any spot negotiation sale for \$100 or \$10,000.

Q. And this was not a spot negotiation sale?

A. It was not.

Q. And it couldn't have been shipped in that form?

Mr. Lamb: Repetition.

The Court: You have gone far enough.

Mr. Leibowitz: All right. That is all.

Redirect Examination

By Mr. Lamb:

Q. Lieutenant, the question has been asked you on cross-examination concerning whether or not you had records in your office of the materials which were contained in the building 1045 and from which I believe you stated that the records showed their value to be \$36,000, that was the situation, was it not?

Mr. Leibowitz: He didn't say the value; he said the cost to the Government.

Mr. Lamb: Cost to the Government. [180]

Q. I will show you Plaintiff's Exhibit 12 and ask

(Testimony of Lt. Harvey B. Apperson.)

you if those are the official records contained in your office of the materials contained in the building 1045, showing the total cost of those articles which were removed from building 1045 and put into the freight car of Meyer Schneider?

A. These were my records.

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit No. 12.

Mr. Leibowitz: I just want to ask one question. Is this your handwriting?

A. No.

Mr. Leibowitz: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 12, being offered and received in evidence, is a part of this record.)

Whereupon Mr. Lamb described Plaintiff's Exhibit No. 12 to the jury.

Q. (By Mr. Lamb): Lieutenant Apperson, some question has been made concerning this collect telephone call. How many collect telephone calls did you make to the defendant Meyer Schneider?

A. One.

Q. You have testified that was made from your office out at the Airbase? A. That is right.

Q. From your extension?

A. That is as well as I remember it was. Yes, I am sure it was.

Q. Did you make any other call to Meyer Schneider that you yourself initiated whether it was col-

(Testimony of Lt. Harvey B. Apperson.)

lect or not other than the one made from your salvage office? A. No.

Q. Lieutenant Apperson, you were asked on cross-examination whether Mr. Matthews of the F.B.I. had suggested to you that Meyer Schneider be entrapped or a trap set for him?

A. No, he very carefully advised me that not to make any omissions to him whatever.

Q. Will you go into detail as to the exact instructions that were given you by Mr. Matthews and by the Staff Judge Advocate and Colonel Chennault and any other instructions that were given you concerning the possibility of any form of entrapment or anything of that sort?

A. As best I remember they told me——

Mr. Eickemeyer: May I object to it, your Honor. I think the word entrapment is a legal term and I think he ought not to use the word "entrapment."

The Court: Well, if he instigated——

Mr. Eickemeyer: He could use "trap."

Q. Just go into details?

A. The best I can remember, Mr. Matthews came out to the Base on the morning of the 23rd and we sat down and had [182] a conference on this thing. And he told me to go ahead and take whatever he offered me and to go ahead and fall in line with what he wanted to do. At the time I felt that it was necessary to protect myself. I don't take bribes and I wanted to be certain if I do take any money like that that I know what to do with it. So Mr. Mat-

(Testimony of Lt. Harvey B. Apperson.)

thews, we then contacted the Colonel and explained to him just what we were going to do. Mr. Matthews very carefully told me not to make any ovations to him and not solicit him in any manner at all and let him more or less carry the ball.

Q. And did Mr. Matthews advise you at that time he consulted with both his district office of the federal bureau of investigation in Butte and me?

A. Yes, he did. He said he had called Mr. Lamb himself.

Q. He didn't advise you he had contacted the F.B.I. office in Butte?

A. I don't remember whether he did or not.

Q. But he did advise you he consulted with me in the United States Attorney's office concerning the probability of your getting into difficulties and the instructions of cooperation you should give?

A. I think he did, yes.

Q. And were you advised by Mr. Matthews that you had to do this or it should be entirely voluntary?

A. No, he told me I didn't have to at all. It was [183] voluntary whatever I wanted to do, whatever I wanted to do.

Q. But you were cautioned at great length not to urge or to initiate any action?

Mr. Leibowitz: I object to counsel, I think it is leading. I think Lieutenant Apperson ought to answer the question, not Mr. Lamb.

(Testimony of Lt. Harvey B. Apperson.)

Mr. Lamb: I am sorry I fell into the same habit you have.

The Court: Yes, I will sustain your objection.

Q. Will you explain in complete detail the conversation you had with Mr. Matthews concerning your actions during the day of November 23rd?

Mr. Eickemeyer: If the Court please, I think this is highly irrelevant and immaterial, a conversation between two of the Government witnesses on a plan made by them. The testimony is the facts that are testified to here that the jury is to base its verdict on and not any conversation between the F.B.I. and the Lieutenant.

Mr. Lamb: If the Court please, the witness was asked upon cross-examination—I didn't go into it on direct because it would not have been proper. He was asked by Mr. Leibowitz if plans were made by Mr. Matthews to trap Mr. Schneider and that opens up the complete field, so Lieutenant Apperson, I believe the law is such that Lieutenant Apperson may now testify to his complete instructions. He can testify, he is entitled to explain all of the instructions which were given to him, and the defense counsel opened up the field themselves.

Mr. Eickemeyer: Not conversations, if the Court please.

The Court: Well you went into it pretty well. I think I will allow him to explain what occurred so there won't be any false impression conveyed to the jury about it.

(Testimony of Lt. Harvey B. Apperson.)

Q. Explain in detail?

A. Like I said before, he told me to go ahead and take any offers Schneider made, but he told me not to make any requests or solicit him in any manner.

Q. Did you also seek the advice of the Wing Staff Judge Advocate? A. I did.

Q. In that connection?

A. I asked Colonel Abdalah—well, I merely told Mr. Matthews I wanted Colonel Abdalah in on this thing because he was trained legally and that in case the thing flew backwards or in case somebody tried to charge me with accepting a bribe, why I wanted to be protected.

Q. All right, then you were asked on cross-examination whether when you went into Murrill's Bar and went back into the men's room if that was by reason of the pre-arrangement that you had with Mr. Matthews, and also you were asked on cross-examination whether you had arranged with Mr. Matthews [185] for the payment to be made either in Murrill's Bar or the arrangement had been made that the payment was to be made in Schneider's room. Now will you explain in detail the arrangements that were made with you with reference to the possible pay-off of the bribe from Meyer Schneider?

A. Mr. Matthews had told me that if there was any money to be passed, any money was to pass between us that he would like to have witnesses. Well, I told Mr. Matthews that I would do anything I

(Testimony of Lt. Harvey B. Apperson.)

could. At the time in Murrills I more or less, well, I delayed, I stayed at Murrills as long as we could hoping he would pay off in front of any witnesses that might be there. And we also had a pre-arranged signal that I should drop a handkerchief or napkin when he had paid off. And the searching, Mr. Matthews said it would be better if I was searched before to ascertain how much cash I had in my pocket so that charges may not be brought against me saying I had pocketed some of his money or something to that effect. Afer we left Murrill's Bar and went to the Park Hotel I suggested we have another drink and hoping he would go into the bar and pay me and thereby still having witnesses. Schneider said he had some good Scotch in his room and let's go up and of course we went into his room.

Mr. Lamb: You may inquire. [186]

Recross-Examination

By Mr. Leibowitz:

Q. Lieutenant Apperson, you were shown this list of merchandise which is marked Plaintiff's Exhibit 12. Now I want you to examine it carefully and tell the jury and his Honor if there is, if your name appears on any of these papers? Just answer if your name appears.

A. My name or my office. To my knowledge it doesn't but I will look again.

Mr. Lamb: Let him examine the papers.

A. No.

(Testimony of Lt. Harvey B. Apperson.)

Q. Lieutenant Apperson, is there one notation, figures or otherwise that bears your handwriting?

A. No.

Q. Now do you know Mr. John L. Riffle?

A. Major John Riffle?

Q. Major John Riffle, do you know him?

A. Yes.

Q. Was he in control of this merchandise?

A. Before it came to me, yes.

Q. Can you tell us when it came to you?

A. Not the exact date, no.

Q. Well, approximately? Well, to help you along, did it come to you in the month of September?

A. I think so but I am not sure. If I might have that again I can tell you. [187]

Q. Can you tell us from that when it came to you? A. Yes.

Q. From any notation that appears upon it when it was shipped to you? A. Yes.

Q. There is something here that indicates to you when it was turned over to you, is that your testimony? A. It is.

Q. I just want to cover up the dates, that is all. Can you tell us the notation if you can find it?

Mr. Lamb: This is argumentative. It is not fair cross-examination.

The Court: No. Show it to him. The witness said he can identify it when it came to him.

(Testimony of Lt. Harvey B. Apperson.)

A. Major Riffle—I received this, my office received it on the 8th of November.

Q. I beg your pardon.

A. September 30th it came to me.

Q. That is your testimony? A. Yes.

Q. There is no question about that?

A. We keep our records. I process many of these things. I don't know exactly what exact date, but Major Riffle sent it to me the 30th of September, 1948.

Q. All right, you are sure about that, are you?

A. As sure as I can from my records. I can't tell you the exact date or time that those came to me. [188]

Q. Let's understand what came to you. Is that what you are talking about came to you, this list?

A. I think so, yes.

Q. Did the merchandise come to you?

A. Soon thereafter.

Q. How soon thereafter did it come to you?

A. Within a few days.

Q. And where did it come from?

A. The Base Quartermaster, Major Riffle.

Q. And it was put into 1045?

A. That is right.

Q. And the Base Quartermaster would have a record of that when they shipped it, wouldn't they?

A. Yes.

Q. Now, who is Keith—do you recognize that?

(Testimony of Lt. Harvey B. Apperson.)

A. Keith Christianson. He was a Tech-Sergeant who was one of my assistants.

Q. And he is known as a storekeeper?

A. No, anyone of us could have been a storekeeper.

Q. Well, I am referring to the title because his name appears on it.

A. Oh, as a dual capacity.

Q. No, we are just referring to this here.

A. I will make him a storekeeper if that will satisfy you.

Q. I am not asking you to satisfy me. I got the word, term "storekeeper" from this notation here?

A. He is a storekeeper.

Q. Yes, and it is right over here. That is how they designate it as storekeeper?

A. That is right.

Q. I am not unfair to you about that, am I?

A. He is a storekeeper.

The Court: Start on something else.

Mr. Leibowitz: I just wanted to follow that thing through. I think it is very important.

The Court: Well, the time is so short I think we had better end here.

(Whereupon the Court admonished the jury.)

The Court: Court is in recess until 1:30 this afternoon. (December 14, 1949) (12:00 noon). [190]

Court resumed, pursuant to adjournment, at 1:30 o'clock p.m., on December 14, 1949, at which time

(Testimony of Lt. Harvey B. Apperson.)

the jury, defendant, and all counsel were present.

The Court: Now, Gentlemen, where were we? Were you examining the witness?

Mr. Leibowitz: Yes, I just want to ask him just a few more questions.

The Court: Very well, proceed.

LT. HARVEY B. APPERSON

resumed the stand and testified as follows:

Recross-Examination
(Continued)

By Mr. Leibowitz:

Q. Lieutenant Apperson, now you were instructed by Mr. Matthews not to originate anything?

A. That is right.

Q. Make any overtures to him, am I correct?

A. That is right.

Q. And after you made this arrangement and got the approval of the Colonel to start this thing in motion you started it off by inviting Mr. Schneider to your office, didn't you?

A. I had an appointment with him prior to seeing the Colonel.

Q. But you expected him at your office, didn't you? A. Yes. [191]

Q. And you took a couple of jackets or something which you threw in front of him, didn't you?

A. No, I threw him the file with those vouchers, those turn-in slips.

(Testimony of Lt. Harvey B. Apperson.)

Q. You did what?

A. I placed the file with those turn-in slips in front of him.

Q. And that is how you started the thing off?

A. If it was started that way.

Q. You intended to have him, catch him, didn't you?

Mr. Lamb: To which we object. It calls for a conclusion on the part of the witness.

Mr. Leibowitz: I think it is proper to cross-examine. I just want to know what his intention was about it.

Mr. Lamb: It calls for a conclusion.

The Court: What are you trying to make him say? What are you trying to get at?

Mr. Leibowitz: Well, what I am trying to do is to show he started the thing off.

The Court: Started what thing off?

Mr. Leibowitz: To start the plan of entrapping Mr. Schneider off, not keeping quiet but throwing a file at him which is just as effective probably as talking about it.

The Court: Well, all right. Was this the [192] beginning?

The Court: Was this the beginning of the plan or whatever it was?

A. Yes, sir. I just put this thing in front of him to see what he would do.

Q. Well, what was it you put in front of him?

A. The file with the turn-in slips in it.

(Testimony of Lt. Harvey B. Apperson.)

Q. With what slips?

A. These turn-in slips. These 447s we call it.

Q. What did you do that for? Was it pursuant to a conversation you had with him?

A. No, sir, I just told him what I had.

Q. That is, you mean what salvage or property you had? A. Yes.

Q. Salvage property? A. Yes.

Q. Did he say anything about a list or wanting to see a listing or anything of that sort? A. No.

Q. How did you happen to do it. What suggestion did you surmise?

A. I guess just to show him what I had, that is all.

Q. And in pursuance to some conversations you had had theretofore in regards other purchased property was that in answer to something he talked to you about?

A. No, sir, he hadn't mentioned it at all. [193]

Q. Well, was it pursuant to his visit? I am trying to get at how it happened, what preceded it?

A. Nothing. He was just in my office and I just threw this file in front of him to see what he would do to see if he was interested in that stuff.

Q. Was that the first interview you had with him? A. No, this was the second day.

Q. This was the second day. Oh, after he made the offer to you? A. Yes.

The Court: Oh, I didn't understand it. All right, go ahead.

(Testimony of Lt. Harvey B. Apperson.)

Q. (By Mr. Leibowitz): Lieutenant Apperson, that was after the arrangement was made with Mr. Matthews? A. That is right.

Q. And that was pursuant to a plan that was the way you would start the thing off?

A. It wasn't any plan exactly. It was just an idea I had.

Q. That was the idea you had? A. Yes.

Q. Now, that list that you showed him that contained all these goods that really weren't for sale, were they?

A. They would have been available.

Q. But they weren't for sale then?

A. No, not that minute.

Q. You couldn't have sold them to him if you wanted to? [194]

A. I explained that to him that I could not.

Q. But nevertheless you threw the thing at him?

A. Yes.

Q. And the purpose was obviously to follow the plan you pre-conceived in arrangements with Mr. Matthews? A. I would say so, yes.

Mr. Leibowitz: All right, that is all.

The Court: Just a moment. You didn't throw it at him, did you?

A. No, sir, I put it on the desk actually. I more or less put it on the desk in front of him.

Q. And that was after he talked to you about purchasing property suggesting it?

(Testimony of Lt. Harvey B. Apperson.)

A. Yes, sir, this was the day after he suggested it.

The Court: All right, I understand.

Mr. Lamb: That is all.

The Court: That is all.

Mr. Lamb: You require that Lieutenant Apperson under the rule be excluded from the court room for the balance of the testimony?

The Court: Well, you might want to use him again. I think perhaps the rule should apply now until we are through.

Mr. Lamb: Just wait in the office.

Mr. Lamb: Private Walker. [195]

LA VAUGHAN WALKER

was called as a witness and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. You were sworn? A. Yes, sir.

Q. State your name, please.

A. LaVaughan Walker.

Q. LaVaughan Walker? A. Right.

Q. And you are a corporal in the United States Air Force? A. That is correct.

Q. And in the fall of 1948 what rank did you hold in the United States Air Force?

A. Private First Class.

(Testimony of La Vaughan Walker.)

Q. Private First Class is sometimes designated as P.F.C.? A. Yes.

Q. And what duties had you been assigned or what branch or section had you been assigned at the Great Falls Air Force Base adjacent to the city of Great Falls?

A. Duty as typist and clerk in the salvage office.

Q. In the salvage office?

A. Great Falls Airbase, yes.

Q. And was that during the time that Lieutenant Apperson was the base salvage officer.

A. That is correct.

Mr. Leibowitz: At this point I object to referring to the base salvage office. I think whatever the proof is [196] along those lines.

Mr. Lamb: Well, he said he was.

Mr. Leibowitz: I think it shows he is in the base salvage office and no such office.

The Court: Let it stand and proceed with your examination.

Q. While you were employed as a typist and a file clerk in the salvage office at the Eastbase did you receive any telephone calls from the defendant, Meyer Schneider? A. Yes.

Q. Will you relate what conversation you had with the defendant on the first occasion?

Mr. Leibowitz: I don't think—I object to it. I don't think a proper foundation has been laid that the person who actually spoke to him was Meyer Schneider. And I don't think even if the man says

(Testimony of La Vaughan Walker.)

to him he is Meyer Schneider, it would make him Meyer Schneider. I think the rule is otherwise. I think you have to recognize the voice; I know it is. Somebody may be talking on his behalf.

The Court: Well, let's see what he says about it and see what develops.

Mr. Leibowitz: May I have an exception to your Honor's ruling?

The Court: Yes, certainly.

Q. Corporal Walker, did the party with whom you talked with on the first occasion over a phone call to the base [197] salvage office, did the party identify himself as to who he was?

Mr. Eickemeyer: If the Court please, I think we are entitled to know the time and circumstances and the place.

The Court: Well, very well.

Mr. Lamb: If you will just give me an opportunity, I will put it all in.

Mr. Leibowitz: I object to the term "identifying himself."

The Court: We will let that stand. Let's see what he says. How he explains it identifying himself. He will get to that pretty quick if you let him answer the question.

Mr. Lamb: Read the question.

(Question read.)

Q. Corporal Walker, did the party with whom you talked with on the first occasion over a phone

(Testimony of La Vaughan Walker.)

call to the base salvage office, did the party identify himself as to who he was? A. Yes.

A. Yes.

Q. Who did the party say that he was?

A. Meyer Schneider of New York City.

Q. And what did Meyer Schneider of New York City say to you?

Mr. Leibowitz: Just a moment. I object to all this.

Mr. Lamb: I will withdraw the question.

Mr. Leibowitz: May we have an exception. [198]

The Court: You may have an exception.

Q. On what date or approximately what date did you receive that telephone call at the base salvage office?

A. It was sometime in October. I am not sure of the date.

Q. Of the fall of 1948? A. That is correct.

Q. And where were you when you received the call?

A. At the base salvage office at the base.

Q. What did the party who said he was Meyer Schneider of New York City say to you?

A. He asked me what the materials consisted of or he wanted to know what kind of goods was in the stuff that he had purchased.

Q. Did he make any reference at all to any bid he had made or purchase that he had made at the Airbase?

Mr. Leibowitz: I object to it as leading.

(Testimony of La Vaughan Walker.)

The Court: Well, you can ask him whether or not he referred to it. It is leading.

Q. Just relate in detail what the conversation was, what he said to you?

A. He wanted to know what the material consisted of. And generally it is in cotton rags. It would be sheets, fatigues, work clothing. It would be anything the Army uses that is cotton would be in there. Anything in the wool rags would be O.D. jackets, pants and different kinds of clothing is what he had on his bid. I mean that is what he was awarded and that is what he bid on and that is what he got. [199]

Q. And did you advise him of those articles you have now enumerated? A. Yes.

Q. At the time of his first call?

A. That is correct.

Q. Was there any further conversation with him at that time? A. I don't believe so.

Q. At a subsequent time did you receive another telephone call from Meyer Schneider, the defendant here? A. I did.

Q. And about when was that?

A. That was a few days later. I am not sure of the time.

Q. That would still be in the month of October, 1948, as near as you can judge now?

A. Either October or the first part of November. I am not sure of that.

Q. And did the party who called you on the second occasion say who he was, who was speaking?

(Testimony of La Vaughan Walker.)

A. Yes.

Q. And what did he say?

A. He said he was Meyer Schneider.

Q. And what conversation and where were you when you received the second telephone call?

A. In the base salvage office.

Q. And what was the conversation which you had with the defendant, Meyer Schneider, on this second occasion?

A. He wanted to know if there was an overage in the [200] materials. Also he wanted to know if there was any socks in with the clothing he had bought. He wanted to know if I could separate the socks from the other materials. And I believe that is just about all.

Q. And what did you tell him?

A. I told him on the socks that I would see what I could do about it, and on the overage I said: "I am quite positive of it, quite sure there is an overage; there always has been and there probably is."

Q. And was there any further conversation with the defendant, Meyer Schneider, at that time?

A. Yes. The only thing after that related to the socks as I remember.

Mr. Leibowitz: I want to interrupt at this moment, your Honor. I think the entire conversation is immaterial, incompetent and irrelevant, and I don't think it has anything to do with the proof of the offenses charged on November 22nd and 23rd.

The Court: Well, it certainly is relevant. It re-

(Testimony of La Vaughan Walker.)

lates to his coming to Great Falls and what happened thereafter. He is inquiring about it and showing an interest in it. It is certainly relevant.

Mr. Leibowitz: Well, I will have my exception, of course?

The Court: Very well. [201]

Q. What was the further conversation you had with him?

The Court: It relates to this?

Mr. Lamb: Yes.

A. I remember him saying: "I am just an everyday guy; can you help me out?"

The Court: What is that? I didn't hear you.

A. Just an everyday guy, he was saying in the conversation.

The Court: He said he was an everyday guy?

A. That is correct.

Q. (By Mr. Lamb): And what was the rest of that sentence?

A. Could I help him out, and that was related to the socks deal, I believe, I am not positive.

Q. The defendant said he was just an ordinary guy and would you help him out?

Mr. Leibowitz: He said something more than that; he said something about relating to socks.

Q. And you believe that conversation related to the removing of the socks from the shipment?

Mr. Leibowitz: Wait a minute. He didn't say that related to the socks to removing the socks from the shipment; to separate the socks, isn't that so?

(Testimony of La Vaughan Walker.)

A. That is the same difference; if you remove them you separate them.

Mr. Lamb: You may cross-examine him. [202]

Q. (By Mr. Lamb): Was there anyone present in the office besides yourself at the time of either of these telephone calls you received from Meyer Schneider, the defendant?

A. None of the two.

Q. There was not? A. No.

Q. At a subsequent time did you receive a third telephone call from the defendant, Meyer Schneider? A. A few days later, yes.

Q. And will you relate what the circumstances of that was and who else was present and so forth?

A. Well, there was not very much on that phone call. I didn't—

Mr. Eickemeyer: I wonder if we could have a time, if the Court please. We haven't any reference to these dates.

Q. About when was the third telephone call, Corporal?

A. I would say as close as I can put it would be about the 8th or 9th of November.

Q. Of 1948? A. That is correct?

Q. And who else was present, if anyone, when the third call came to you?

A. Lieutenant Apperson was present and talked to the defendant on that call, and also Sergeant Aulgur was there.

Q. And what conversation did you have with Meyer [203] Schneider on that particular date?

(Testimony of La Vaughan Walker.)

A. None that I can particularly remember. I think he related the same, he was coming out, something like that. That was all I understood on that.

Q. Who answered the telephone?

A. Lieutenant Apperson answered that call and called for me. I was on the outside going out to get in the jeep. He called for me and I came back and answered the phone. And he says: "Meyer Schneider from New York." So I talked, I think I told him who I was, and then Lieutenant Apperson says he wants to talk to him, so I told Meyer Schneider I would let him speak to the base salvage officer.

Q. Yes, and that was the end of your conversation with him at that time?

A. Yes. I stayed in there for a few minutes and left and went on down to the warehouse.

Q. And were you in and around the salvage office during the period November 22nd and 23rd, 1948, when the defendant, Meyer Schneider, came out to pick up his purchase?

A. No, sir.

Mr. Lamb: You may cross-examine. [204]

Cross-Examination

By Mr. Leibowitz:

Q. Corporal Walker, when you say the person whom you said it was Meyer Schneider asked you to separate or remove the socks from the other stuff, that was a matter of convenience for him, wasn't it?

A. That is correct.

(Testimony of La Vaughan Walker.)

Q. He didn't want you to take the socks out of the stuff he had bought?

A. He wanted me to get the socks out of the stuff he bought.

Q. He said that?

A. That is right. He wanted me to see if I could do that.

Q. And take that stuff and do what, throw it away?

A. I guess so, or hold it back to another sale.

Q. Well, don't you know, Mr. Corporal Walker, that socks is a different commodity altogether and it might be easier in separating the goods to keep the socks apart?

A. Socks are made of wool or cotton material and that is all we are interested in. If we had a bag over here for wool and a wool sock come in naturally we put the wool sock into the wool bag; if cotton we put them in a cotton bag. And when we sold cotton and wool rags we sold cotton and wool rags. [205]

Q. And don't mix the socks with other stuff, keep the socks separate?

A. No, he says: "Are there any socks in the material?" I says: "Yes, there's socks in there." He asked me: "Can you see if you can take the socks out of the material?" He didn't say what to do with them, or put them separate. What he wanted us to do I think was hold them back for another sale.

Q. He didn't say that, did he?

A. No, he didn't say what to do with them.

(Testimony of La Vaughan Walker.)

Q. All he asked you was to separate them?

A. Yes.

Mr. Leibowitz: That is all.

Mr. Lamb: That is all.

Mr. Leibowitz: I want to ask him a few more questions:

Q. (By Mr. Leibowitz): Prior to the first call you have never spoken to anyone by the name of Meyer Schneider as far as you know? A. No.

Q. So that you weren't familiar with his voice?

A. No.

Q. So the mere fact that he told you he was Meyer Schneider didn't convince you that he was Meyer Schneider?

Mr. Lamb: That is calling for a conclusion and it is objected to.

The Court: Yes. [206]

Mr. Leibowitz: All right. That is all. Of course I have an exception to all that testimony, your Honor?

The Court: Oh, yes.

Mr. Lamb: Sergeant Aulgur.

SGT. RAYMOND P. AULGUR

was called as a witness, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Lam:

Q. You were sworn? A. Yes.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Your name is Raymond P. Aulgur?

A. Yes, sir.

Q. And you are a Staff Sergeant in the United States Air Force, is that correct? A. Yes.

Q. And in the fall of 1948, did you have the same rank as you now hold? A. Yes, sir.

Q. And were you assigned at that time to the Great Falls Airbase adjacent to the city of Great Falls, Montana? A. Yes, sir.

Q. And as a non-commissioned officer at the Great Falls Airbase to what section or branch had you been assigned for your duties?

A. I was assigned to base salvage office, N.C.O. in charge. [207]

Q. Base salvage office?

A. Base salvage office.

Q. And you were the non-commissioned officer in charge? A. Yes, sir.

Q. And who was the commissioned officer in charge of the base salvage office.

A. Lieutenant Apperson.

Q. And that is Lieutenant Harvey B. Apperson?

A. That is right.

Q. And on November 22, 1948, will you relate what you did as far as the defendant, Meyer Schneider, is concerned?

Mr. Leibowitz: What date was that?

Mr. Lamb: November 22, 1948.

A. Some time around nine o'clock in the morn-

(Testimony of Sgt. Raymond P. Aulgur.)

ing the guard called from the gate and said there was a Mr. Schneider at the gate.

The Court: Speak louder so they can all hear.

A. Approximately ten o'clock the guard called from the main gate and said there was a Mr. Schneider to see the salvage officer. I proceeded to the gate in a jeep, picked Mr. Schneider up and took him back to the office.

Q. Was that pursuant to some instructions given you prior to that time?

A. Lieutenant Apperson told me Mr. Schneider would be in sometime around ten o'clock and that I was to pick him up. [208]

Q. And when you and the defendant, Meyer Schneider, arrived at the base salvage office, what was the, was there any salvage property in the office itself and the warehouse immediately to the rear thereof?

A. There was quite a large amount of surplus clothing laid out on the floor in open piles. It was not covered.

Q. And when you and the defendant, Meyer Schneider, arrived at the office and walked in, were those piles of surplus clothing in the immediate vicinity and within sight of the defendant, Meyer Schneider?

A. Part of them were, yes.

Q. At that time shortly after ten o'clock on November 22, 1948, did you have a conversation with the defendant, Meyer Schneider?

A. Yes, sir.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Was there anyone else present at the time of that conversation?

A. Just for a couple of minutes.

Q. Who was that?

A. Sergeant Christianson.

Q. Will you relate what part of the conversation took place in the presence of Sergeant Christianson?

A. As I remember about the only thing that was said was about the cold weather.

Q. All right, and then did Sergeant Christianson leave the office? A. Yes, sir.

Q. And that left you and Meyer Schneider alone in the base salvage office? A. Yes, sir. [209]

Q. Did you have a further conversation with the defendant, Meyer Schneider, after Sergeant Christianson left? A. Yes, sir.

Q. Will you relate what that conversation was?

Mr. Leibowitz: I object to that conversation. I think it is irrelevant and immaterial and incompetent; it's not within the issues here.

The Court: I don't know. You don't know and I don't know what it is about.

Mr. Leibowitz: Of course, we know what is in the indictment. I don't think it has anything to do with the indictment.

The Court: Well, let's see whether it does or not. I am not going to shut him off.

Mr. Leibowitz: I think it would be highly prejudicial. I will have my exception, your Honor.

(Testimony of Sgt. Raymond P. Aulgur.)

The Court: Take your exception.

The Court: What was the conversation about?
What did it relate to?

A. Mr. Schneider referred to the property laying on the floor and asking if some kind of a deal couldn't be made. I informed him the property had been listed for sale and would be published in the very near future and if he cared to, he could look the property over and I would give him a form showing the property so he could submit a bid. [210] And as I started to go after the form he made the remark that he thought I misunderstood him; he meant just a deal between the two of us. I further informed him that the property was up for sale and that nothing could be done; if he wanted to bid on it, that he could. And then I handed him a copy of the list we had made up to submit the property for sale. While I was giving him the list there was some remark made about a lot of money could be made, and approximately that time Lieutenant Apperson came in.

Q. And was that the end of your conversation with the defendant at that time? A. Yes, sir.

Q. All right, then after Lieutenant Apperson came in the office what took place within your hearing and sight?

A. I introduced Mr. Schneider to the Lieutenant and they left almost immediately to go to the salvage yard as far as I knew to inspect the property that Mr. Schneider had purchased on the contract.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Then at some time later did you have some association with the defendant, Meyer Schneider, or further conversation?

A. The following afternoon was the first time I saw him after that.

Q. And that would be November 23, 1948?

A. Yes, sir.

Q. All right, will you relate what transpired when you saw him the afternoon of November 23, 1948?

A. Well, Lieutenant Apperson had instructed me to get a [211] truck from the motor pool as there was material to load in the box car. And we went directly to building 1045 where there was surplus property stored. And Mr. Schneider pointed out the boxes he wanted loaded and as he pointed them out I put them on the two-wheeler and wheeled them out to the truck. And the only thing he said to me other than pointing out the boxes and saying "This one," was something in regard to the fact I handled a two-wheeler before.

Q. What arrangements, if any, were made with you for the payment for your services in loading materials upon the truck and subsequent disposition of them?

A. Lieutenant Apperson asked me if I cared to help load the property and that Mr. Schneider would pay us for it. There was no amount of money specified. We would be paid for loading and he asked me

(Testimony of Sgt. Raymond P. Aulgur.)

if I would get the rest of the boys in the salvage yard to help load it if they wanted to.

Q. And how many did you secure to help, do you recall?

A. I believe there were three men from the salvage yard and the truck driver, besides myself.

Q. And what else, if anything, did the defendant, Meyer Schneider, do in addition to pointing out the particular boxes you should load, if you recall?

A. Well, as the boxes were removed he had a piece of paper in his hand and was writing something down and I presume he was writing down what was in the boxes. [212]

Q. Did the boxes contain some description of number or contents?

A. Outside of every box it was either marked with black pencil or there was a small card attached to it listing—most of the boxes had the size of each article in the box and the amount.

Q. And after you loaded the first load at the direction of the defendant, Meyer Schneider, where did you take the truck and its load of merchandise?

A. We got in the truck and went to the warehouse on the base where the box car was spotted on a siding.

Q. And what instructions, if any, were given you as to the manner of loading the car?

A. The only thing that I had been told about was to load the merchandise in the boxes first.

Q. And who gave you those instructions?

(Testimony of Sgt. Raymond P. Aulgur.)

A. Lieutenant Apperson.

Q. And after, while unloading the first load of boxes and materials into the freight car, where was the defendant, Meyer Schneider, if you know?

A. Standing right outside the car.

Q. And after you unloaded the first truck load then what did you do?

A. We proceeded back to building 1045 to get the second load. [213]

Q. And what did the defendant do, if you know?

A. Mr. Schneider and Lieutenant Apperson got back in Lieutenant Apperson's car and went back to building 1045 also.

Q. And after you had arrived at building 1045 what, if anything, did the defendant do?

A. He came back in the building and started pointing out the boxes again he wanted.

Q. Was this same procedure followed then generally during the loading of the various loads from the warehouse?

A. Yes.

Q. And how many loads of boxes and materials were taken from building 1045 at the direction of the defendant, Mr. Schneider?

A. Somewhere around five truck loads.

Q. And after the removal of the five truck loads of boxes and materials what, if anything, was left in the warehouse 1045?

A. There was some McClellan saddles, a few aircraft instruments, and some airplane tires and some automobile tires.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Were there any further surplus clothing materials left in the building?

A. Not to my knowledge.

Q. And did you haul all of the loads of surplus materials at the direction of Meyer Schneider to the freight car that you have referred to?

A. Yes, sir.

Q. And all of those articles were loaded into the freight car? A. Yes, sir. [214]

Q. And after emptying building 1045 then what did you do?

A. After the last truck load was put on the box car we went from the box car to the salvage yard and started loading the rags.

Q. And by the rags do you know whether or not those were the rags that the defendant, Meyer Schneider, had purchased by bid and contract?

A. Yes, sir.

Q. Those were the articles? A. Yes.

Q. And what did you do with those wool and cotton rags?

A. We loaded them on top of the boxes in the box car.

Q. And about what time did you complete the loading of the cotton and wool rags?

A. Somewhere around ten-thirty or eleven o'clock.

Q. That night? A. Yes, sir.

Q. And about when did you start loading the car? A. Around 3:30 in the afternoon.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. And did you receive any compensation, you and the other helpers for the loading of the car?

A. Mr. Schneider paid the other four boys \$10.00 apiece and myself \$15.00, because I was the overseer as he said.

Q. And about when was that payment made?

A. I don't remember just exactly when that was. It was before we had completed the loading of all the rags.

Q. And did Lieutenant Apperson and the defendant, Meyer [215] Schneider, stay with you during all of the time that you were loading the cotton and wool rags? A. No, sir.

Q. Do you recall about when they left?

A. I believe it was right after the first truck load.

Q. Of rags? A. Of rags, yes, sir.

Q. Have you any idea about what time it was then? A. No, I don't. It was dark.

Q. And did you have any further conversation with the defendant, Meyer Schneider, other than what you have related?

A. Not after he paid us for loading the property.

Q. And you have related, as far as you can and as far as you remember, all of the conversations which you had with him? A. Yes.

Mr. Lamb: You may cross-examine.

(Testimony of Sgt. Raymond P. Aulgur.)

Cross-Examination

By Mr. Leibowitz:

Q. Sergeant Aulgur, were you told by Lieutenant Apperson about this plan of trapping Mr. Schneider?

A. Lieutenant Apperson called me on the telephone and told me no matter what he did to keep my mouth shut and keep my eyes open. That is all the conversation.

Q. You didn't ask him any questions?

A. No.

Q. And that was on when, November 23rd? [216]

A. I believe it was, yes, sir.

Q. Now, you stated that you were directed to go to the motor pool and pick up the car, is that so?

A. To get a truck, yes, sir.

Q. Can you command a truck at any time you want to?

A. We call the motor pool and request a truck be assigned to our department at any time we need it.

Q. You don't have to give them any reasons for it, do you?

A. No, other than the fact we have some property to move.

Q. Beg your pardon?

A. Other than the fact we have something to move from one place to another.

Q. That is true, but do you have to say to them, we have to deliver, we have certain supplies to go out and we have to make a shipment?

(Testimony of Sgt. Raymond P. Aulgur.)

A. Not necessarily, no.

Q. You don't have to? A. No.

Q. Do you have the keys to warehouse No. 1045?

A. Yes, sir.

Q. Ordinarily that place is locked, isn't it?

A. Kept locked all the time.

Q. All the time—the only time you can get into it is when they call upon you? Are you the only person who may have the keys? [217]

A. Lieutenant Apperson had a key at that time. There were two keys to the lock.

Q. And you had the other key?

A. Correct.

Q. In warehouse 1045 did you have any stuff that was to be reissued to the Army?

A. No, sir.

Q. That store house 1045 is a store house that's been set aside for salvage clothing?

A. It was a building that had been assigned to us to stock this surplus property in because we didn't have room to put it down in the salvage yard.

Q. And sometimes it can be used for some other purpose?

A. No, sir. It was used for surplus property only.

Q. Now, you say you started to load the stuff sometime about three-thirty, three o'clock?

A. Yes.

Q. And you knew that you were going to work after hours, isn't that so? A. Yes, sir.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. And were you assigned by Lieutenant Apperson to get up a gang—were you asked to get a gang?

A. To load the truck, yes, sir.

Q. Were you told that these people would have to work after hours? A. Yes, sir.

Q. And you told that to the group of soldiers?

A. The agreement was that we would work until it was loaded.

Q. Now, from your experience and from your knowledge, have [218] you ever loaded a car for salvage or salvage materials? A. No, sir.

Q. Wait a minute. After three-thirty?

A. No, sir.

Q. How long have you been attached to the salvage department?

A. Since the 22nd of September, 1948.

Q. You got there a little after Lieutenant Apperson did? A. Yes, sir.

Q. And are you still attached to that depot?

A. Yes, sir.

Q. And that answer that includes up to the present day? A. Yes, sir.

Q. You didn't ask Lieutenant Apperson then the necessity for loading after hours, did you?

A. Well, I didn't think it was necessary as long as I was going to be paid for it, I didn't mind it.

Q. You were only interested in the pay; you didn't care? A. That is right.

Q. And the same thing holds true for the other men as far as you know? A. Yes, sir.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Now, do you know that or not, do you know or not whether Mr. Schneider had paid for any of the merchandise?

A. No, sir, I didn't, other than what he purchased on the contract.

Q. You knew that, did you? A. Yes, sir.

Q. And how did you know that? [219]

A. That has to be paid for before we have authority to release the property to the successful bidder.

Q. And the only time you can release the property to the successful bidder is after he has made payment for it?

A. To the contracting officer, yes, sir.

Q. If Mr. Schneider came up to you and said to you: "Load the car of rags." Would you, which he legitimately purchased, without showing you that he paid for it; would you do it?

A. No, sir, I wouldn't.

Q. Would you take his word for it that he paid for it? A. No, sir.

Q. Well, what would you require of a purchaser to do before you would start loading the merchandise?

A. Either he would have a slip from the contracting officer stating the fact that he had paid the balance or a call from the contracting officer stating that he had paid it.

Q. In other words, the release of the merchandise would have to come from the contracting officer? A. Yes, sir.

(Testimony of Sgt. Raymond P. Aulgur.)

Q. Is he the only man who has the authority to release the merchandise after it has been paid?

A. Yes, sir.

Q. And the contracting officer wasn't Lieutenant Apperson, was it? A. No, sir.

Q. Lieutenant Greene, is it? A. Yes, sir.

Q. Did you get a call from Lieutenant Greene that it was paid?

A. As far as I know, Lieutenant Apperson received the [220] notification, if I am not mistaken. He went to the contracting office with Mr. Schneider to make the payment.

Q. You didn't go along, did you?

A. No, sir.

Q. Did Lieutenant Apperson then tell you that Mr. Schneider had paid for the merchandise?

A. No, sir.

Q. Well, you stated you knew Mr. Schneider had paid for it; how did you get that information?

A. The Lieutenant wouldn't have said to load the property unless it had been paid for.

Q. That is, you assumed that? A. Yes, sir.

Q. And you also assumed that Mr. Schneider had paid for the stuff that came out of 1045?

A. Yes, sir.

Q. Did you know that the stuff coming out of 1045 could not be sold on "spot"—

A. On a spot sale?

Q. Yes. A. Yes, sir.

Q. You knew that, didn't you?

(Testimony of Sgt. Raymond P. Aulgur.)

A. Yes, sir.

Q. Did you also know that the stuff out of 1045 had not been sold to anybody? A. Yes, sir.

Q. You knew that but nevertheless you took the merchandise out pursuant to—I am not quibbling about that—but you took the stuff out pursuant to an order that was directed to you?

A. Yes, sir.

Q. And you followed that order?

A. Right.

Mr. Leibowitz: That is all. [221]

Redirect Examination

By Mr. Lamb:

Q. Sergeant, you were asked the question whether the only person who could release the property would have been the purchasing and contracting officer, and were asked in addition to that if that was Lieutenant Greene and not Lieutenant Apperson. You recall that? A. Yes.

Q. If a release had been secured by payment to the purchasing and contracting officer, in whose possession would the salvage property or scrap be at that time?

A. It would be in the possession of the salvage officer or in the warehouse.

Q. Well, then would the purchaser, if he had paid the purchasing and contracting officer, need a release from someone further in order to secure the physical possession of the property which he had purchased?

(Testimony of Sgt. Raymond P. Aulgur.)

A. There is a form we use in order for them to remove the property from the base as we give them the property.

Q. Would they need any release from you, or release from Lieutenant Apperson as the base salvage officer?

A. From the salvage officer if they were taking it off in a truck. In a box car the car is assumed on the base as far as I know and there is no release required to have the car removed from the base. [222]

Q. How would they get the materials out of the place where it might be stored? Would they have to secure permission—who would they have to secure permission from eventually; is it the purchasing and contracting officer?

A. It would have to come directly through the salvage office.

Q. And they wouldn't need a release from either you or Lieutenant Apperson at that time?

A. No, sir.

Q. They wouldn't? A. No, sir.

Q. How would they get it out of your possession?

A. Well, in that way of speaking, yes, they would have to have our permission to take it, and it would be loaded while one of us, one of the salvage personnel, watched the removal of the property.

Q. Were the services which you performed that day in securing some help and the removal of the property and the loading of the car part of your duties or did you perform them voluntarily?

(Testimony of Sgt. Raymond P. Aulgur.)

A. It was voluntary.

Q. And you were later paid for those voluntary services by the defendant, Meyer Schneider?

A. That is right.

Mr. Lamb: That is all. [223]

Recross-Examination

By Mr. Leibowitz:

Q. Sergeant, now where the loading took place is known at the Airbase as a restricted area, isn't that so? That is, after certain hours you can't——?

A. Yes, sir.

Q. And before you could do any work in that place you had to secure some order of some sort permitting you to do that type work there?

A. Yes, sir.

Q. And did you obtain that order?

A. Yes, sir.

Q. Personally?

A. Lieutenant Apperson obtained the permission to be in the area loading after the hour.

Q. And where did that order come from?

A. It came from the guard house and the Provost Marshal's Office.

Q. That, of course, is not Colonel Chennault's office at all? A. No, sir.

Q. It is a different unit altogether?

A. Yes, sir.

Mr. Leibowitz: That is all.

(Testimony of Sgt. Raymond P. Aulgur.)

Redirect Examination

By Mr. Lamb: [224]

Q. As a matter of fact, the Provost Marshal and Guard House at that particular moment were under the command of Colonel Chennault, were they not?

A. Yes.

Mr. Lamb: That is all.

Q. (By Mr. Leibowitz): They were not under the control of the base salvage officer, were they?

A. No, sir.

Mr. Leibowitz: That is all.

Mr. Lamb: Lieutenant Fenton. The Lieutenant was not sworn.

LT. ALBERT J. FENTON

having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. State your name, please.

A. Albert J. Fenton.

Q. And you are a First Lieutenant in the United States Air Force? A. That is correct.

Q. And are you stationed at the Airbase immediately adjacent to the city of Great Falls, Montana? A. Yes.

Q. And what official duties did you have at the Great Falls Airbase? A. Base Signal Officer.

Q. And as Base Signal Officer do you have supervision and charge of the Government records

(Testimony of Lt. Albert J. Fenton.)

pertaining to telephone calls and the things of that nature? A. That is true. [225]

Q. Lieutenant, I show you WD AGO Form 11-1-39, which has been marked Plaintiff's Exhibit No. 11, and ask you if that exhibit was part of your official records at the Great Falls Airbase over which you have immediate charge and supervision?

A. To the best of my knowledge, yes.

Q. And as a matter of practice does your office maintain the records of long distance phone calls that are made collect as to the person that makes the call and so forth? A. That is true.

Q. And does that record which you now have in your hand become a part of your permanent records at the Great Falls Airbase?

Mr. Eickemeyer: If the Court please, I think he said to the best of his recollection.

The Court: To the best of his knowledge.

Mr. Eickemeyer: Knowledge, yes.

Mr. Lamb: At this time we reoffer Plaintiff's Exhibit No. 11, which is offered at your request.

Mr. Eickemeyer: It is objected to.

Mr. Leibowitz: Before it is offered I would like to ask some questions concerning it.

The Court: Go ahead, cross-examine him.

Q. (By Mr. Leibowitz): What is your name?

A. Fenton, sir.

Q. Fenton? A. Yes, sir [226]

Q. Lieutenant, how many telephones are there at the Airbase? A. Approximately 473.

(Testimony of Lt. Albert J. Fenton.)

Q. Does each telephone bear a different number as far as you know?

A. Well, sir, there's approximately three main lines and approximately 173 extensions; the three main lines all have different numbers.

Q. And do you take charge of each and every one?

A. Yes, sir, I do.

Q. I beg your pardon?

A. I do.

Q. Of course, you don't know anything about the individual calls that come through, do you?

A. We have a complete record of every call that leaves the base that is toll charged, either collect in or out.

Q. Collect to whom?

A. To anyone.

Q. You mean a call being made from your place to someone else to be charged to that other person, or do you mean a call from some other person to your place collect to you?

A. Regardless of the type call if it is long distance call in or out collect, a complete record is maintained by our office.

Q. Is this your handwriting, Lieutenant Fenton?

A. No, sir, it isn't.

Q. Do you recognize the handwriting on it?

A. No, sir, I don't. [227]

Q. Did you bring it to court?

A. No, sir, I didn't.

Q. You don't know where it came from?

A. It came out of my records.

Q. How do you know?

(Testimony of Lt. Albert J. Fenton.)

A. It was gotten out of the records which we withdrew from the files by an O.S.I. man in the presence of my accounts clerk who is a buck sergeant.

Q. Were you present then? A. I was not.

Q. Then, of course, you don't know?

A. That is right, sir.

Q. You presume that procedure was followed?

A. Yes, sir.

Q. Now, Lieutenant Fenton, do you know the number of Great Falls 9795?

A. No, sir, I do not.

Q. Do the numbers at your place bear the exchange Great Falls? A. Sir?

Q. Do the numbers bear the exchange Great Falls? In other words, do you have to say "Great Falls," so and so number?

A. No, sir, we can dial 9 and leave the base and dial the numbers.

Q. Let me put it this way. I want to call the Airbase. Do I have to call the Airbase and give the number?

A. Yes, sir, you would have to dial 7651 if you expect to get the operator. [228]

Q. What I mean is this. If I am in New York City and want to make a phone call to the Airbase and I happen to know a number there——

A. On the base, yes.

Q. Would I have to start over by saying "Great Falls" and then give that number in order to get

(Testimony of Lt. Albert J. Fenton.)

the Airbase, or would I just give the operator the number and get the Airbase?

A. You would have to say that number if you were trying to call the base from town here. It is one of our trunk lines.

The Court: He hasn't answered the question.

Q. I am trying to get it from New York City. I know—let me have one of your numbers.

A. 361 is my own number.

Q. 36—— A. 361 is my own extension.

Q. Now, if I called from New York City and said I wanted to get the Airbase at Great Falls——

A. It is a call from New York City?

Q. Yes. And I say to her “number 361,” will I get the number that way?

A. Yes, the operator does, downtown does connect you.

Q. Or do you think I would have to say to the operator “New York City—I want Great Falls 361”?

A. You would not get it Great Falls 361.

Q. In other words, that Great Falls number would not be [229] an Airbase number?

A. Would you repeat that question?

Q. I say, in other words, where we say “Great Falls” it would be necessary to use the Great Falls as an exchange plus a number it wouldn't be anywhere than the base?

A. That is true. We don't have the same num-

(Testimony of Lt. Albert J. Fenton.)

bers in town we have at the base. We have three digit numbers on the base.

Q. I believe I asked you whether you were familiar with the telephone number 9795? You don't know that? A. No, sir, I don't.

Mr. Leibowitz: That is all. Wait a minute. I am sorry.

Q. We have a telephone number here, Lieutenant Fenton, 7651? A. Yes.

Q. Now that is one of your numbers?

A. That is one of our trunk numbers.

Q. Trunk numbers?

A. Yes, that is the trunk line between the exchange in town and the telephone exchange at the base. That is our trunk line.

Q. Is there any way of verifying through your department whether Lieutenant Apperson had actually made a call to New York City collect from the telephone number 7651?

A. That is the only record with the exception of charges that are put out by the telephone company which would not name [230] any individual. It is retained by the operator.

Q. But as long as you have this here, Lieutenant Fenton, it is not a charge any more?

A. What do you mean it is not a charge?

Q. In other words, that would be a record in your place? A. That is right.

Q. Can you tell us from this slip here the name of the operator who handled that call?

(Testimony of Lt. Albert J. Fenton.)

A. Just that it is operator 11 at the time, and operator 11 would be one of the girl operators at the base.

Q. Do you happen to know who she is?

A. I couldn't say right now. I can find out. I couldn't say right now.

Q. Would you find out? A. I could, sir.

Q. Would she have a separate book?

Q. No.

Q. That is the only record she would have?

A. That is right, sir. She probably couldn't definitely state that that was the true record because they handle so many calls, but that would actually show a call that was made.

Q. Well what does that mean right here "toll okay, l.t." by "toll okay"?

A. Well it is collect and she got an okay on it.

Q. You mean before she put the call through she had an okay from the person receiving the call they would accept it? A. That is right. [231]

Q. Is that so it may not mean something else?

A. No, not that I know of.

Q. It won't mean that okay the party is——

A. It means the toll is okay and it is accepted.

Q. Do you have the same type slip for every call or do you have different colors?

A. Every one is on the same form and same color.

Q. What is the serial number J-78?

A. That is the priority actually of a control office. J, control office, and 78 is the number of the

(Testimony of Lt. Albert J. Fenton.)

call. And we maintain records on J-78 as to who made the call and who authorized the call; in case of a collect call of the Government the Government would pay for the call.

Q. It is possible Lieutenant Fenton, that that call was made by Lieutenant Apperson to New York City and was paid by you people even though it is collect here?

A. I will have to check my records.

Q. Will you do that? A. I could.

Q. Will you have the information for us?

A. At what time.

Q. Say tomorrow?

A. I could check my records and give you the information I have available because those took place prior to my time on the base.

The Court: You haven't given him a memorandum of [232] those two things you asked him about so there won't be a mistake about it when he comes in?

Mr. Leibowitz: Suppose we give you a copy of the slips and you check them and verify them.

A. Yes, sir, I will get any information you require.

Mr. Leibowitz: All right.

Mr. Lamb: I have offered Exhibit 11 in evidence.

The Court: What is that?

Mr. Lamb: I have offered Plaintiff's Exhibit No. 11 in evidence.

(Testimony of Lt. Albert J. Fenton.)

The Court: Well I think it is sufficiently identified.

Mr. Leibowitz: I think we ought to wait until we get the information.

The Court: All right, we will wait until tomorrow morning. But don't forget to offer it. It is easy enough to do that.

Mr. Lamb: Lieutenant, will it be possible for you to be here ten o'clock in the morning with that information?

Mr. Leibowitz: Yes.

Mr. Lamb: You were going to furnish him with a copy; are you going to do that?

Mr. Leibowitz: Yes.

Mr. Lamb: I wonder if I might have a ten minute recess? [233]

The Court: We will take a fifteen minute recess.

(2:40 p.m.)

(Court resumed, pursuant to recess, at 2:55 p.m. at which time the jury, defendant, and all counsel were present.)

The Court: Call your next witness.

Mr. Lamb: Mr. Matthews.

JOHN J. MATTHEWS

was called as a witness, having been previously sworn, and testified as follows:

Direct Examination

By Mr. Lamb:

Q. State your name, please.

A. John J. Matthews.

Q. And what official position if any do you occupy with the United States Government?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And how long have you been so employed?

A. Approximately ten and one-half years.

Q. And where are you now stationed?

A. I am now assigned to the Chicago Division.

Q. And prior to the assignment in the Chicago Division where were you assigned? [234]

A. I was assigned to the Butte Division.

Q. And in the fall of 1948 were you so assigned to duty at Great Falls, Montana? A. I was.

Q. Mr. Matthews, you heard the testimony of Lieutenant Apperson here yesterday and today?

A. Yes, sir.

Q. Will you relate your first contact with Lieutenant Apperson with reference to the transactions concerning which he has testified?

Mr. Leibowitz: I object to that as irrelevant and immaterial and incompetent and not in the presence of the defendant and not binding upon the defend-

(Testimony of John J. Matthews.)

ant at all what he might have arranged or said with Mr. Apperson.

The Court: I think so. You will have to get at it in some other way.

Q. When and where did you first meet Lieutenant Apperson?

A. I first met Lieutenant Apperson at about two p.m. on the afternoon, two p.m. November 22nd, 1948.

Mr. Leibowitz: That is all.

Q. Where?

A. In my office in the Federal Building at Great Falls, Montana.

Q. And whom if anyone was he in company with?

A. He was accompanied by Captain John Brynildson, the Director of the 15th District of the Office of Special Investigations at the Great Falls Air Force Base. [235]

Q. And after meeting Lieutenant Apperson in company with Captain John Brynildson when did you next see Lieutenant Apperson?

A. On the morning of November 23rd, 1948.

Q. And where?

A. At the Great Falls Air Force Base.

Q. And whom if anyone was in company with him at that time?

A. I first met him in the O.S.I. or the Office of Special Investigations office at the Air Force Base

(Testimony of John J. Matthews.)

where I spoke with him in the presence of Captain Brynildson, and I believe other O.S.I. agents?

Q. And after meeting Lieutenant Apperson and Captain John Brynildson on the morning of November 23, 1948, what did you do?

A. I went with Lieutenant Apperson to the office of Colonel John Chennault, who was the Base Commanding Officer of the Great Falls Air Force Base.

Q. And whom if anyone was there in addition to Colonel Chennault, yourself and Lieutenant Harvey B. Apperson? A. A Colonel Abdalah.

Q. And what official position if any did he occupy at that time at the Great Falls Airbase?

A. It was my understanding he was the Base legal officer.

Q. Lieutenant Apperson was asked upon cross-examination [236] concerning instructions which you may have conveyed to him. Will you relate at this time what took place in Colonel Chennault's office and the instructions which you gave to Lieutenant Apperson?

Mr. Leibowitz: I am going to object to that; it hasn't taken place in the presence of the defendant. Of course what was discussed among them can't be binding.

Mr. Lamb: It was all in evidence.

Mr. Leibowitz: I may have done that on cross-examination of Apperson but it does not leave it open as far as Mr. Matthews.

Mr. Lamb: It is in corroboration of statements

(Testimony of John J. Matthews.)

which Lieutenant Apperson gave to Mr. Leibowitz, which was produced by him in his cross-examination of Lieutenant Apperson.

The Court: I think so. I will overrule the objection. Go ahead.

Q. Will you relate the conversation that took place at that time and the instructions which you gave Lieutenant Harvey Apperson?

A. I instructed Lieutenant Apperson and discussed it in the presence of Colonel Abdalah and Colonel Chennault. I informed him specifically that under no circumstances was he to say anything to Mr. Schneider to originate any possible bribery, and further that he was to do nothing whatever other [237] than to follow any suggestion that Mr. Schneider may wish to make, and further that he was not to ask for any amount of money or to do any bargaining with regard to the amount of money but to accept only what Mr. Schneider was to offer to him in the event he was to make such an offer.

Mr. Leibowitz: Now, your Honor, I move to strike his answer on the ground it is very prejudicial to the defendant. It does not prove that Mr. Apperson may not have followed his instructions or did follow his instructions.

The Court: It seems to me that since you have developed that feature of the case and gone into it as thoroughly as you have by using the name of Mr. Matthews and Lieutenant Apperson and what was said and what was done and what instructions

(Testimony of John J. Matthews.)

and brought the subject into the case in that way that Mr. Matthews would certainly have an opportunity to say what he did say to Apperson.

Mr. Leibowitz: But that doesn't prove, your Honor,—well, I don't want to argue the point. All right, I will take my exception.

The Court: The defendant hasn't got anything to do with this and you brought it out outside of it but of course it is relevant to the case.

Mr. Leibowitz: There may be relevancy of the part of the testimony that Mr. Apperson did not initiate anything because he followed the instructions but that may not be true. [238]

The Court: He has already testified what Mr. Matthews said to him; you brought that all out into the case.

Mr. Leibowitz: That may be all right.

The Court: Now we will find out what Mr. Matthews told him; there may be some conversation there to your advantage.

Mr. Leibowitz: Well I am not looking to advantage through Mr. Matthews and I may take exception to that. I will take my exception.

The Court: All right, you may take your exception and let it stand what he told Lieutenant Apperson; all this conversation was brought up by counsel himself.

Q. (By Mr. Lamb): Was there any further instructions given to him or advice?

A. The conversation with Apperson occupied a

(Testimony of John J. Matthews.)

period of some time, and further reference was made to those particular points as our plans progressed.

Q. Did you or did you not advise him of your consultation with me and the instructions which I had given to you to relate to Lieutenant Apperson?

Mr. Leibowitz: I object to it as a leading question.

The Court: All right, preface it by whether or not.

Mr. Eickemeyer: If the court please, may this all go in under that same objection? [239]

The Court: Oh, sure.

Q. Did you or did you not convey any instructions from me? A. I did, sir.

Q. And are those included in the statement which you have just given?

A. That is correct, sir, they were.

Q. In addition to the instructions with reference to any conduct on behalf of Lieutenant Apperson what arrangements if any did you make with him for his conduct in the event a payment was made to him by the defendant, Meyer Schneider?

A. At that particular time we had no idea as to what had transpired—

Mr. Leibowitz: Just a moment. We submit the witness should answer the question. He is a lawyer and we don't care for any gratuitous statements. I think he should answer the question.

(Testimony of John J. Matthews.)

The Court: Yes, answer the question, Mr. Matthews.

The Witness: Will you repeat that question?

(Question read.) Q. In addition to the instructions with reference to any conduct on behalf of Lieutenant Apperson what arrangements if any did you make with him for his conduct in the event a payment was made to him by the defendant, Meyer Schneider?

A. Lieutenant Apperson was to signify by a pre-arranged signal to us in the event he received at any time subsequent to that point he was to signify to us that he had received a [240] quantity of money or whatever much might be given to him. He was instructed to signal with his car lights if money was paid to him while riding with Mr. Schneider in Mr. Apperson's own car. He was to give another signal which consisted of the mislacing of a handkerchief in his pocket in such manner it would drop providing the payment was made in a bar or restaurant where we would not be able to observe the actual payment. And we also made plans of a general nature of what he should do in the event the payment was to be made in any other place. He was instructed that if such a payment was made that it was to be turned over to us, and, of course, he was cautioned that it was strictly voluntary on his part and we were not forcing him to do this; it was entirely up to him whether to cooperate and assist in this matter or not.

(Testimony of John J. Matthews.)

Q. All right, and those arrangements were all made at the same time instructions were given to him as you have testified? A. Yes, sir.

Q. And after that meeting what did you do?

A. I returned to Great Falls and performed other duties in connection with the case involving making necessary telephone calls to my headquarters office at Butte, Montana and to the United States Attorney's office at Billings, Montana.

Mr. Leibowitz: Your Honor, I just want to reserve my objection to the entire line of testimony.

The Court: All right. [241]

Q. And after that did you at any time after that return to the Great Falls Airbase? A. I did.

Q. At about what time and what date?

A. At approximately 3:30 on the afternoon of November 23rd I returned to the Great Falls Air Force Base with Special Agent Robert Leonard of our office.

Q. And where did you go?

A. We went immediately—upon entering the Base I drove down to the area in the vicinity of the jumper warehouse and observed a freight car, Boston & Maine freight car on a siding. It was the only car there. At that time I observed no one in the vicinity of there. I returned to the office of Special Investigation office on the Air Force Base where I proceeded to wait.

Q. And how long did you remain in the office of Special Investigation at the Great Falls Airbase?

(Testimony of John J. Matthews.)

A. I remained there until approximately 6:30 or very shortly before.

Q. And was Special Agent Robert Leonard with you during all that time? A. He was, sir.

Q. And at sometime after 6:00 o'clock or about 6:30 on the evening of November 23, 1948, what did you do?

A. I got in my car with Special Agent Leonard and O.S.I. Agents Robert Spaulding and Mr. Segal and proceeded in the direction of Great Falls with the view of following [242] Lieutenant Apperson's car.

Q. All right, after leaving the Base then what did you do?

A. I was in radio contact with our other F.B.I. car. I gave instructions to the other Agent to come east on Second Avenue North for the purpose of intercepting Lieutenant Apperson's car in the event that we were not to locate it or were too far behind it or were to miss it altogether. Upon arriving at the school at 37th Street I had not observed Lieutenant Apperson's car, which was a maroon Studebaker, and upon radio contact I was aware of the fact the other car had not intercepted them and I gathered that perhaps they had not left the base and I turned around and went east on Second Avenue North towards the East Base.

Q. On this return trip did you see Lieutenant Apperson's car? A. I did, sir.

Q. About where was it at that time?

(Testimony of John J. Matthews.)

A. At the point on Second Avenue North where the road turns in a northerly direction, which is approximately one-quarter to one-half a mile to the entrance to the gate I observed the Studebaker proceeding in a westerly direction. I immediately turned our car around and proceeded to follow him at a short distance into the city of Great Falls.

Q. And where did you follow the car with Lieutenant Apperson? [243]

A. Lieutenant Apperson's car proceeded in a westerly direction until it came to Third Street North whereupon it turned South, anyway it turned left and I followed it across Central Avenue, and then at a point on Third Street South between Central Avenue and First Avenue South I observed the Studebaker to park, in the vicinity, in the nearby vicinity of the Electric Hotel.

Q. And what did you do?

A. I proceeded to find the nearest available parking space which happened to be on First Avenue South. In other words, I drove south to the first intersection, which was First Avenue South, turned right, and right at the corner I found an available parking place. I parked my car and locked it and proceeded to walk back toward Central Avenue.

Q. Did Special Agent Leonard remain in the car or get out too?

A. Special Agent Leonard got out too.

Q. After you and Special Agent Robert Leonard

(Testimony of John J. Matthews.)

got out of the car too where did you and he go?

A. We went up to Central Avenue and at a point just east of Third Street North on the south side of Central in front of the First National Bank I met Special Agent Strahl.

Q. And did Special Agent Robert Leonard stay with you and Agent Strahl?

A. No, he did not.

Q. Where if any place did Special Agent Leonard go? [244]

A. I observed Special Agent Leonard proceed a few doors eastward on Central Avenue to a bar known as Murrill's Bar and I saw him enter.

Q. And then what did you and Agent Strahl do?

A. We proceeded to remain in the car which Mr. Strahl was driving for a matter of several minutes, possibly five or ten minutes.

Q. And then what did you do if anything?

A. Realizing that Lieutenant Apperson not seeing us——

Mr. Leibowitz: I move to strike that out; that is not responsive.

The Court: Yes.

A. Special Agent Strahl and myself shortly after seven o'clock entered Murrill's Bar.

Q. And when you entered the bar what did you do and see?

A. Immediately upon entering the bar I was approached by Special Agent Leonard.

Q. And what?

(Testimony of John J. Matthews.)

A. Special Agent Leonard mentioned that Lieutenant Apperson had just gone into the men's room. I proceeded back through the bar into the men's room where I saw Lieutenant Apperson and immediately conducted a search of his clothing. I went through his various pockets.

Q. And what did you find?

A. I found a small quantity of money. He had seventy [245] some cents in one trouser pocket, and seventy cents, I believe it was, and twenty-one cents in another pocket, and a ten-dollar bill in a wallet in his left rear pocket.

Q. And outside of other personal items was that the only money that was on his person at that time?

A. That was the only money on his person at that particular time.

Q. All right, after completing the search of the person of Lieutenant Harvey B. Apperson what did Apperson do if anything?

A. Lieutenant Apperson immediately left the men's room.

Q. And what did you do?

A. I remained there for a matter of seconds, a minute.

Q. And then what happened if anything?

A. I was just about ready to leave when Mr. Schneider walked in and I proceeded to wash my hands and then I left and Mr. Schneider left.

Q. When you say Mr. Schneider do you mean the defendant, Meyer Schneider?

A. Yes, sir, I do.

(Testimony of John J. Matthews.)

Q. And when you left the men's room leaving the defendant, Meyer Schneider, in the men's room what did you do?

A. I immediately left Murrill's Bar and proceeded to walk up and down across the street with Special Agent Strahl.

A. Seeing Special Agent Leonard leave Murrill's Bar I [246] crossed the street and joined Special Agent Leonard on the east side of Third Street South between Central Avenue and First Avenue South, and while standing with Mr. Leonard I observed Lieutenant Apperson and Mr. Schneider standing by Schneider's car which I previously said was parked on——

Mr. Eickemeyer: Schneider's car?

Mr. Lamb: You may cross-examine in just a minute.

Q. Was that the defendant's car?

A. Pardon me. Lieutenant Apperson's car. I saw them both standing there. And then I proceeded to walk down to First Avenue South. I left Special Agent Leonard there. I made a phone call or two and then proceeded to the Park Hotel.

Q. And when you entered the Park—or did you enter the Park Hotel?

A. I did, sir. I entered the Park Hotel.

Q. And when you entered the Park Hotel, whom if anyone did you see?

A. I saw Special Agent Strahl there and Special Agent Leonard, both sitting in the lobby.

(Testimony of John J. Matthews.)

Q. And what did you do?

A. I took up a position in the corner of the lobby. I expect you would call it the northeast corner of the lobby and just remained there until——

Q. Did Agents Strahl and Leonard also remain in the [247] lobby during that time?

A. They did, sir.

Q. All right, then what transpired if anything?

A. Sometime after 8:00, at approximately 8:15 I saw Lieutenant Apperson get off the elevator in the lobby of the Park Hotel. We waited for a few seconds and he gave his pre-arranged signal, whereupon I joined him in the lobby and he immediately handed me an envelope and said something to the effect that there was \$1500 in there.

Q. I will show you an envelope marked Plaintiff's Exhibit No. 14 and ask you to examine it and ask you if this is the envelope that was handed to you by Lieutenant Apperson, Lieutenant Harvey B. Apperson in the lobby of the Park Hotel at the time you have just testified?

A. This is the same envelope that was given me by Lieutenant Apperson at that time.

Q. Is it in the same condition now as it was at that time?

A. No, sir, it isn't.

Q. What is the difference?

A. At the time it was given to me it was sealed and did not have the signatures appearing on the rear side over the seal, or the flap.

(Testimony of John J. Matthews.)

Q. And was the envelope flat and empty as it is now?

A. No, the envelope had something in it at that time.

Q. All right, what did you do with the envelope?

A. I put it immediately in my pocket. [248]

Q. And then what did you do?

A. Rang for the elevator. Excuse me. I asked Lieutenant Apperson in what room Mr. Schneider was and he mentioned 340.

Q. 340?

A. 340. I rang for the elevator and mentioned to Special Agent Leonard he should take Lieutenant Apperson and give him a search to ascertain just what amount of money he had on his person at that particular time. Special Agent Strahl and myself went up to the third floor, went to room 340, knocked, and on being asked who was there we announced ourselves or I answered that we were F.B.I. Agents.

Q. And after you announced you were F.B.I. Agents what took place?

A. The door was opened and we entered. The door was opened by Mr. Schneider.

Q. You mean the defendant, Meyer Schneider?

A. The defendant, Meyer Schneider. We entered the room and I immediately placed him under arrest on the charge of bribing an Air Force officer.

Q. And that was after you entered the room?

A. That was just as we entered the room.

(Testimony of John J. Matthews.)

Q. And did Agent Strahl enter the room with you? A. He did, sir.

Q. And then what took place? [249]

A. I might add that we identified ourselves through our credentials at the time we were placing the man under arrest. We having previous information and he subsequently told me and I had this information at the time that he had a permit to carry a gun in New York City and I proceeded to make a search of his person.

Mr. Leibowitz: I am going to object to that. I think it is prejudicial and I don't think it is relevant to this case at all that he had permission to have a gun. I don't see the materiality of it. It tends to prejudice.

The Court: Well you didn't have a gun, did you? A. No, we did not.

The Court: We will cut it out. Sustain the objection.

Mr. Leibowitz: All right.

Q. All right, then what did you do?

A. Proceeded to make a search of the, as I said we made a search of his person which is customary in all cases and a search, a brief search of the room for the purpose as we do in all cases of locating any instruments by which the——

Mr. Emigh: Just a minute. We will object to this. Let him tell what he did.

A. I made a search of the room and I took the money from Mr. Schneider's pocket and placed

(Testimony of John J. Matthews.)

it on the floor and [250] instructed Special Agent Strahl to count it. I asked him if he had additional money and he said he did and brought over a kind of traveling bag on the bed. I opened the bag and extended it to him and asked him if he would take the money out and the defendant reached in the bag and took money out and handed it to me and then laid it on the floor and I observed Mr. Strahl making a count of the money.

Q. Do you know at this time how much money was counted in front of the defendant, Meyer Schneider, which he took from his suitcase in the room at that time?

Mr. Eichemeyer: Just a moment. This testimony the defendant objects to upon the ground and for the reason it is incompetent, irrelevant and immaterial; that the crime of which he is testifying, the agent is testifying was not committed in his presence; that he had no search warrant or any warrant of any kind to go through the property or take any money from the defendant or from any of his belongings or out of his room.

Mr. Lamb: Your Honor, the witness has testified that the defendant, Meyer Schneider, removed the money from his bag and handed it to the agent.

Mr. Eickemeyer: And for the further reason it is no part of the commission of the offense because the money nor any of the property in that room or on his person was used in the commission of this offense and it is prejudicial [251] to this defendant.

(Testimony of John J. Matthews.)

The Court: Yes, it is after the offense was committed.

Mr. Lamb: I will withdraw the question.

The Court: I think you better. I will sustain the objection.

Q. All right, then after that what did you do?

A. I prepared a list of the money——

Mr. Eickemeyer: Now, if the court please, I don't think it is fair for counsel to go into this matter after the objection has been sustained.

Mr. Lamb: I merely asked him what he did.

The Court: I think we will stand on that objection, or sustain it.

Q. Then what did you do?

A. We took Mr. Schneider from the room. I made suggestions to him concerning the safety of his property and informed him we were not seizing that particular property. However, just before leaving the room I observed on the telephone stand a piece of paper and I made a quick glance at it.

Mr. Eickemeyer: Now, if the court please, this is all happening after he has been arrested for the commission of the crime.

The Court: Naturally and we will see what it is [252] about and see if it has any connection or relevancy to the act itself.

A. I observed a notation appearing on the paper concerning overcoats, parkas,——

Mr. Eickemeyer: Now, just a minute, if the court please, I submit that Mr. Matthews, the witness

(Testimony of John J. Matthews.)

here, is a lawyer himself and duly admitted to practice in the courts of the state of Montana——

The Court: Never mind the preliminaries. What is the objection?

Mr. Eickemeyer: My objection is he is getting indirectly evidence in here that has been ruled is not admissible. He can't testify what the list says. If they have a list, let them give it to us and we will object in the proper way, but this way they are trying to get in indirectly something I don't think they can get in.

Q. Did you take a list from the room of the defendant, Meyer Schneider, which you found on the telephone stand at that time?

A. I did, sir.

Mr. Leibowitz: I do want to object to the question "Did you make a list?"

Mr. Lamb: Did he take a list.

Q. I will show you a sheet of paper marked Plaintiff's Exhibit 3 and ask you if this is the sheet which you took from the defendant's room at that time? A. It is, sir. [253]

The Court: At the time you made the arrest, Mr. Matthews?

A. Yes, your Honor.

Q. (By Mr. Lamb): And appearing on the reverse side thereof are some initials and dates in ink. Will you tell us when those were placed here and by whom if you know?

A. The initials J.J.M. and the date 11-23-48 was

(Testimony of John J. Matthews.)

placed on there by myself shortly thereafter that same evening.

Q. And the other initials?

A. The other initials H.E.S. and the date 11-23-48 were placed on there by Mr. Special Agent Strahl. And the initials that appear to be R.M.L. and the date 11-23-48 were placed on there by Special Agent Robert Leonard.

Q. And with the exception of those initials and the dates which you have just read is the paper in the same condition as it was when you took it from the room of the defendant immediately after his arrest?

A. With one exception, sir.

Q. All right, if you will point that out. Oh, and with the words appearing here in ink "Plaintiff's Exhibit No. 3"?

A. Yes, sir.

Q. And outside of that that is the only change that has been made in this particular instrument?

A. Yes, sir.

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit No. 3. [254]

Mr. Eickemeyer: To which the introduction of Plaintiff's Exhibit 3 the defendant objects upon the ground and for the reason that it is incompetent, irrelevant and immaterial, no proper foundation having been laid. That it is not part of anything that was used in the commission of the crime. That the evidence has shown that the defendant had already been placed under arrest and that the crime

(Testimony of John J. Matthews.)

for which he was arrested had been completed. That the officer had no search warrant or any authority whatsoever to take these papers from the person or the property of the defendant.

Mr. Lamb: I might state, your Honor, that appearing on the face thereof——

Mr. Eickemeyer: Just a minute——

Mr. Lamb: I might state, however, this exhibit has been previously identified by a witness who appeared before him on the stand, Lieutenant Harvey B. Apperson.

Mr. Eickemeyer: It doesn't make any difference who it was identified by.

Mr. Lamb: That is your opinion.

Mr. Angland: It was seized incident to arrest, your Honor, and if the back of the sheet is observed, it has a direct relationship to the charge made in the indictment and the evidence heretofore offered by the Government.

The Court: What were you going to call my attention to? [255]

Mr. Lamb: The fact that Lieutenant Apperson already identified the sheet in addition to this particular data and the notations appearing on the reverse side thereof having direct relationship to the crime charged in the indictment being incident to the crime.

The Court: Yes, because of the contents of it why it is relevant; there is no question about that. And it was picked up by the officer as an incident

(Testimony of John J. Matthews.)

of the arrest at the time he was arrested. I will overrule your objection.

Mr. Eickemeyer: Note an exception.

Mr. Lamb: I will read this Plaintiff's Exhibit 3.

(Whereupon Mr. Lamb read Plaintiff's Exhibit 3 to the jury.)

Mr. Lamb: If you care to look at this.

The Court: Now that first page so far as I can see has no application to this page or the property other places I don't think has anything to do with this.

Mr. Lamb: Your Honor, Lieutenant Apperson testified that the defendant, Schneider, made that abstract himself in the purchasing and contracting office which pertains to the contract in which he was successful.

The Court: And the other part of it pertaining to the Great Falls Base, was that made in his presence too?

Mr. Lamb: No.

The Court: He saw him making this same list on [256] the front page?

Mr. Lamb: On the front part.

The Court: Are you sure he absolutely identified it when on the stand as the paper he saw the defendant writing?

Mr. Lamb: That is correct, your Honor.

The Court: All right.

Mr. Leibowitz: Of course we have an exception.

(Testimony of John J. Matthews.)

The Court: Then that may go in. It is a means of identification of the paper itself. Oh, yes, you may have your exception. Proceed.

(Whereupon said Plaintiff's Exhibit No. 3, offered and received in evidence, is a part of this record.)

Q. (By Mr. Lamb): All right, after obtaining the slip of paper which I have just read to the jury what did you and Agent Strahl and the defendant, Meyer Schneider, do?

A. We left the room and at approximately quarter to nine and went in my car, after leaving the key at the desk, and went to the Federal Building where he was taken into the Marshal's office.

Mr. Leibowitz: I object to anything that followed the arrest as no part of the proof.

The Court: I will sustain the objection. You don't need to go any further on that. [257]

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit No. 4.

Mr. Eickemeyer: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 4, offered and received in evidence, is a part of this record.)

Q. (By Mr. Lamb): Mr. Matthews, you stated with reference to Plaintiff's Exhibit No. 4, the envelope, that at the time it was handed to you by Lieutenant Apperson that you placed the same in

(Testimony of John J. Matthews.)

your pocket and that it had something contained therein? A. Yes.

Q. Did you later examine and open the envelope which has been now admitted as Plaintiff's Exhibit No. 4? A. I did, sir.

Q. And what did you find therein?

A. I found 50 twenty dollar bills and 50 ten dollar bills.

Q. Totaling how much money?

A. Totaling \$1500.

Mr. Leibowitz: We are not going to make it difficult and save a lot of time. We will admit if he wants to offer the \$1500 in evidence we have absolutely no objection.

Mr. Lamb: All right. [258]

Mr. Eickemeyer: We don't admit it is in that envelope.

Q. You have it all sealed; will you open it?

Mr. Leibowitz: I will admit that if he wants to admit it, and we will save a little time anyway.

Mr. Angland: Will you admit this is the same \$1500 that was in the envelope?

Mr. Eickemeyer: Yes.

Mr. Leibowitz: We will admit that.

Q. Mr. Matthews, this has been in your possession and this is the money you removed from the envelope Lieutenant Schneider gave you?

A. Yes, sir.

The Court: Not Lieutenant Schneider.

(Testimony of John J. Matthews.)

Mr. Lamb: Or I mean Lieutenant Apperson?
I am sorry.

A. Yes.

Q. And this money is now contained in an envelope now marked Exhibit 13, which I now offer in evidence? A. Yes.

Mr. Eickemeyer: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 13 offered and received in evidence is a part of this record.)

Q. After the removal of the defendant, Meyer Schneider, from the room and his arrest was a charge placed against him? [259]

A. Yes, sir, there was.

Q. And when and where?

Mr. Leibowitz: I object to that as wholly irrelevant, immaterial and incompetent; he is here in court now on a charge.

The Court: Yes, I think so. I think I will permit him to show the usual procedure required by law was carried out at that time. You may go that far and no farther.

A. I signed a complaint before United States Commissioner Eric B. Parsons at approximately ten or ten-thirty that evening and the defendant was arraigned shortly thereafter the same evening.

Q. On what charge?

A. On a charge of bribing an Air Force officer.

(Testimony of John J. Matthews.)

Q. And was bond set by the Commissioner at that time?

Mr. Leibowitz: I don't think—it doesn't make any——

Q. And was a commitment issued?

A. Yes, sir.

Q. Before the arraignment before the United States Commissioner and bond set and commitment issued did you have a conversation with the defendant, Meyer Schneider, relative to the offense on which he had just been arraigned?

A. I did, sir.

Q. Will you relate what if anything you told him before engaging in this conversation? [260]

Mr. Eickemeyer: I object to it as wholly irrelevant, immaterial and incompetent. We are not claiming any rights have been violated; that is not our defense.

Mr. Angland: Any admissions made after arrest would be admissible.

Mr. Eickemeyer: I don't think he is attempting to prove admission. I think he is showing his constitutional rights were protected.

Mr. Angland: You have to lay a foundation.

Mr. Eickemeyer: Any way we object to it until a foundation has been laid.

Mr. Lamb: That is what I am attempting to do.

Mr. Eickemeyer: He hasn't done it yet.

The Court: Give him a chance.

Mr. Lamb: Read the question.

(Testimony of John J. Matthews.)

(Question read.) Q. Will you relate what if anything you told him before engaging in this conversation?

A. I told him that he was not required to make any statement or to make any admissions to us. I told him we were federal officers and he was aware of that fact. I told him under the Constitution of the United States he need not say anything and I told him anything he might say might or could be used against him in court. I told him we were not making any threats or promises to him; in that connection that if he didn't care to he didn't have to tell us anything. [261]

Q. Did you give him any advice concerning an attorney?

A. I told him he was entitled to have his attorney.

Q. And after so advising the defendant of his constitutional rights did you have a conversation with him relative to the offense of which he was charged?

Mr. Eickemeyer: If the court please, we would like to have the time and the persons present and I don't think the place has been identified.

The Court: Lay the foundation.

Q. Did you have a conversation with him?

A. I did, sir.

Q. Who was present?

A. Special Agent Strahl of the F. B. I. and O. S. I. Special Agent Robert Spaulding.

(Testimony of John J. Matthews.)

Q. And where was the conversation had?

A. In the F. B. I. office in the Federal Building, Great Falls, Montana.

Q. And at about what time?

A. The conversation began five minutes after one o'clock on the morning of November 24th.

Q. 1948? A. 1948.

Q. And you may now relate the conversation which you had with the defendant as far as the same may relate to the crime with which he was then charged?

A. I discussed with him the manner—— [262]

Mr. Eickemeyer: Now just a minute, if the court please. I submit the other way, what he said, what he saw, whether he discussed anything with him.

Q. All right, what was said by him and what was said by yourself.

A. Schneider said to me he had become aware of the fact salvage and scrap material were being offered at the Great Falls Air Base through a trade publication, which I believe he said was named *Salvage*, and mentioned he had communicated with officers here and had been awarded a bid on scrap items, and that he had found it necessary to come to Great Falls to secure those materials. And he had been in communication with them and they said it would be impossible for them for them to ship those things to him or pack them and ship them to him. He mentioned—I asked him specifically whether he

(Testimony of John J. Matthews.)

had given any money to Lieutenant Harvey B. Apperson. At first he said—the first time I asked him that question he said no he had not given Lieutenant Apperson any money. I asked him later about the envelope and I asked him if he had given that envelope to Lieutenant Apperson and he said he had not. I asked him what he and Lieutenant Apperson talked about up in the room at the time the payment was made. He said they discussed several things. And I got back to the question again. I asked him, now you—or words to that effect—you said you did not give Lieutenant Apperson any money. He said, no, I [263] didn't say that, I didn't give him money for anything that had to do with the Great Falls Air Force Base. So I asked him did you give him any money, and he very politely said he did not care to answer that question. I asked him whether he had given Lieutenant Apperson any money to invest in a real estate transaction and then he gave me the same answer, he politely declined to answer that question. I asked him other things that may have slipped my mind at the moment.

Q. Did you make any notations at the time of this conversation from which you could now refresh your recollection?

A. I made notations at that time and shortly thereafter.

The Court: You made notations at the time you were talking to him?

(Testimony of John J. Matthews.)

A. I did, your Honor.

The Court: Well you can refer to it to refresh your recollection.

Q. (By Mr. Lamb): Will you look over the notes you took at the time and immediately thereafter for the purpose of refreshing your recollection as to any further conversation you had with the defendant at that time. Did you find anything further by way of refreshing your recollection other than what you have testified?

A. I did, sir.

Q. What was it?

A. I asked him concerning his dealings with the personnel [264] at the Base. I asked him first whether he had ever contacted Lieutenant Apperson by phone and he said he hadn't and subsequently he said he did talk to Lieutenant Apperson on one occasion and Lieutenant Apperson informed him at that time he would have to come to Great Falls to obtain the shipment of scrap and it would not be possible for them to make arrangements for them to ship it to him.

Q. Do I understand it he first said he did not talk to Lieutenant Apperson at all by telephone?

A. Yes, sir.

Q. And then subsequently said he had talked with him as you have just related?

A. Yes. I asked him whether during his telephone conversations or other communications or while in conversation with Lieutenant Apperson he

(Testimony of John J. Matthews.)

had ever made any proposition of an irregular nature and he said he had not. I asked him specifically whether Lieutenant Apperson had ever made such a proposition to him and he said Lieutenant Apperson had not. He told me about going to the Base on the morning of November 22nd and met him, Lieutenant Apperson, and looking around at the various materials at the warehouse there. He admitted or he told me that he left the Base in a cab shortly before noon on the morning of the 22nd and that he did not or was not in contact with Lieutenant Apperson again until the afternoon of November 23rd when he went into the Base and spent the afternoon with Lieutenant Apperson. He stated at [265] that time they were loading materials on to a freight car and that he was there until approximately six or shortly thereafter when they came to town. I asked him specifically if during that period Lieutenant Apperson had made any irregular suggestions or propositions to him concerning the disposal of the property and he said such had not been done, and I asked him whether he had made similar propositions to Lieutenant Apperson and he said he had not done that either. He related he came down to town with Lieutenant Apperson in the latter's car and had a few drinks at Murrill's and went up to the hotel room, into the hotel room, and I believe I have related what happened in the hotel room previously.

Mr. Lamb: You may cross-examine.

(Testimony of John J. Matthews.)

Cross-Examination

By Mr. Leibowitz:

Q. Mr. Matthews, I understand you are an Attorney admitted to practice in the state of Montana?

A. Yes, sir, I am.

Q. Now you were first called in sometime on November 23, 1948, that is correct?

A. November 22nd, sir.

Q. And the following day you went to see the Provost Marshal?

A. No, sir. [266]

Q. And from there you went to see the Colonel Chennault?

A. That isn't exactly correct, sir. I went to see the O. S. I.

Q. Yes, and after you saw him you went to see the Provost Marshal?

A. No, I didn't see the Provost Marshal.

Q. And the following morning you went into Colonel Chennault's office?

A. Colonel Chennault's office.

Q. Why did you go to see Colonel Chennault?

A. At the suggestion of Lieutenant Apperson. If I may explain further, Lieutenant Apperson stated he was willing to cooperate but that he was interested in making a career of his Army service and he wanted expert legal military advice what he could do. He mentioned Colonel Abdalah is a very competent attorney and that he would like to talk it over both with Colonel Chennault and Colonel

(Testimony of John J. Matthews.)

Abdalah, and that was our reason for going there.

Q. And that was the only reason he did?

A. That seemed to be his main reason. I couldn't say what all the reasons were.

Q. Well before you did see Colonel Chennault did you discuss all this plan did you with reference to having Mr. Schneider pay money?

A. Yes, sir, we did.

Q. Discussed it thoroughly, didn't you? [267]

A. We discussed it both before and after very thoroughly.

Q. Did Lieutenant Apperson say that he can't do those things because he has no authority to do some of those things you requested him to do?

A. I don't believe he said anything like that to me, sir.

Q. Well did the question arise whether he had a right to have merchandise loaded from a warehouse into a car after hours without some permission?

A. No, I don't believe we discussed that phase of it, sir.

Q. That didn't come up at all?

A. Not with regard to our conversation. Now maybe perhaps—I want to understand you correctly. You mean we discussed his authority under the various regulations to load cars and unload materials?

Q. Whether he had a right to do those things?

A. No, we didn't go into that at all.

(Testimony of John J. Matthews.)

Q. Supposing Colonel Chennault was not available and supposing he was left out of the picture altogether; did that question ever arise?

Mr. Angland: We object as calling for an answer on a question based on hypothesis not shown to exist.

Mr. Eickemeyer: This is cross-examination.

Mr. Angland: This is a hypothetical question not based upon any facts in evidence and does not tend to prove [268] or disprove any issue in the case.

The Court: I hardly think it is a proper question. Frame it a little differently.

Q. Mr. Matthews, you didn't make the suggestion immediately Colonel Chennault should be told of this thing and to get the approval of Colonel Chennault, did you?

A. Now I wouldn't say I made that suggestion, sir. We were discussing things, Apperson and myself.

Q. Just you two?

A. And other individuals, representatives of the Office of Special Investigations.

Q. Was Colonel Abdalah there?

A. Not at the time we started talking about the matter.

Q. He was there later on?

A. He was there later when we met with Colonel Chennault. The reason, and I believe you asked me why Lieutenant Apperson went to Colonel Chen-

(Testimony of John J. Matthews.)

nault, now I may have had a reason been told me but it was not my doing we went to Colonel Chennault and I think it was Lieutenant's reason, and the reason was he intended to make a career out of the Air Force.

Q. That is what he said to you?

A. That is what he said it was.

Q. Did Colonel Abdalah say anything about it was wise under those circumstances to see the Commanding Officer before anything like this takes place at the Base? [269]

A. Now he might have talked to Lieutenant Apperson when I got there that morning. All I know, sir, is that when I got to Colonel Chennault's office Colonel Abdalah was there and we met in Colonel Chennault's office, all sat around the desk and both officers were there.

Q. How long did you stay over at Colonel Chennault's office?

A. Oh, I would only be able to give you a guess.

Q. Ten minutes, half an hour?

A. I would say half an hour.

Q. And did Colonel Chennault ask you any questions? A. I believe he did, sir.

Q. What sort of questions did he ask you?

A. The actual questions I probably couldn't recall but he was interested for one thing in whether the cooperation of Lieutenant Apperson would result in any embarrassment to the Air Force or to the Base Personnel, and he was interested in know-

(Testimony of John J. Matthews.)

ing, of course, whether—of course he mentioned the fact that I might be an attorney, but he was interested in knowing where I got my background or advice I was giving and I told him I was giving him information obtained by me from the United States Attorney who is in effect my legal counsel in this case.

Q. Did Colonel Chennault say anything about the necessity of waiving certain regulations in order to have this [270] plan consummated?

A. I am rather certain he made no mention of any regulations.

Q. Did you tell him it had to take place in a restricted area late at night after hours?

A. Well now at that time you must understand that I didn't have much idea what was going to be done.

Q. Well everything was planned at that time?

A. It was planned. Now I am familiar with the Base but not to the extent I know a restricted area, and I never brought the question up. I don't think anyone else discussed the question of the restricted area.

Q. Did anybody bring up the question that G. I. labor was going to be furnished?

A. I don't have the recollection it was brought up.

Q. Is there anything in your records or notes that took place in the office there?

(Testimony of John J. Matthews.)

A. I personally have no records of what took place there.

Q. The only records you made pertaining to the case of Meyer Schneider is only what took place after the arrest, am I correct?

A. Let me dwell on that a moment, sir. No, that isn't exactly correct.

Q. You have other records?

A. I have other records. [271]

Q. Do your records indicate what took place at the Air Base?

A. When I say records that I have, I have my own personal notes and I have notations I think remaining of my interviews.

Q. Have you got those notations here?

A. I have most of my notes; in fact all of them I believe are here, sir.

Mr. Leibowitz: Would I be permitted to examine those notations, your Honor?

The Court: Well I think not, if Mr. Matthews can testify, if he can testify from it.

Mr. Leibowitz: Well I would like to make a record here. I want to note my objections to the refusal of the court to permit me to examine the records made by the F. B. I. Agent, Mr. Matthews, to any transactions or negotiations he had with Meyer Schneider or anybody with reference to this case.

The Court: Well I will permit him with the notes he can look at the notes to, with reference

(Testimony of John J. Matthews.)

to any conversation or interview with Meyer Schneider, the defendant. But he has made notes no doubt about many other things in connection with the case that he couldn't testify to and wouldn't be competent evidence at all, and I don't think you have any right to examine notes of that kind. If it was [272] competent evidence here, he probably consulted with the United States Attorney and found out what would be competent evidence and what would be admissible and what would not. Now your wholesale request, of course, will be denied.

Mr. Leibowitz: I am only interested in those notes which have to do with his investigation of the case is all.

The Court: I am interested in those notes which have to do with competent evidence here in this case. I will overrule your objection.

Mr. Leibowitz: I have my exception.

The Court: Yes.

Q. Now have you any notes at all, Mr. Matthews?

A. Yes, I have, sir.

Q. With reference to any conversation you had with General Chennault?

A. I believe I have none here.

Q. You haven't got them in court?

A. I don't believe I have any of those notes at all.

The Court: He spoke about notes and conversations with the defendant. Now you are inquiring

(Testimony of John J. Matthews.)

about something that probably would not be admissible in evidence.

Mr. Leibowitz: I want to find out if he has anything there that may contradict him. There may very well be something written down that contradicts what he says.

The Court: I don't think you have the right to go [273] on a general fishing expedition of that kind.

Mr. Leibowitz: All right, I note my objection and I would like to have my exception, that is all.

The Court: It has already been passed on two or three times.

Q. Mr. Matthews, did Colonel Abdalah make any suggestions as to what should be done with reference to any difficulties with respect to the loading and removal of the merchandise from the Air Base?

A. I don't believe he did, sir.

Q. Did you tell Colonel Chennault that it would be necessary to remove merchandise from the warehouse and load it on the truck and before payment was made to the officer, Mr. Greene?

A. I don't believe it went into that detail, sir.

Q. You didn't go into that detail?

A. No, sir.

Q. In any event Colonel Chennault told you to go on and do whatever you have to do?

A. That is approximately correct, sir. If I may add to that. He didn't tell me what to do, not being under his jurisdiction. He made any suggestions

(Testimony of John J. Matthews.)

or anything regarding that to Lieutenant Apperson.

Q. In your resence was it done?

A. In my presence he was given—if you allow me to put it this way—Lieutenant Apperson was given authority by [274] Colonel Chennault to co-operate with the Federal Bureau of Investigation in the investigation of the case.

Q. Did Lieutenant Apperson tell you that it would be necessary to violate some of the rules and regulations before anything like that could take place?

A. Well, sir, I believe that was—what do you mean by rules and regulations?

Q. The removal of merchandise from a warehouse at night in a restricted area using Government labor?

A. You mean more or less administrative regulations and things like that? It was rather apparent to both of us what it would amount to in other circumstances the stealing of property would not be right, so I don't think we discussed it back and forth.

Q. You recognized it couldn't have been done in any other way unless approved by the officer in charge unless the stuff was stolen?

A. That was rather apparent. We didn't discuss that phase of it.

Q. That was the only way it could have been done by Lieutenant Apperson if Colonel Chennault had not approved the activities?

(Testimony of John J. Matthews.)

A. I don't believe I am qualified to answer what authority Lieutenant Apperson had and what authority Colonel Chennault had—well, I mean I don't feel I could answer your [275] question, sir.

Q. Well you said it was perfectly apparent it could only take place if the stuff was stolen?

A. I don't believe I said that either.

Mr. Leibowitz: He said something about stealing.

Mr. Lamb: Yes, he said something about it.

Mr. Leibowitz: Let's go back to the answer.

Mr. Lamb: Read the answer.

A. You mean more or less administrative regulations and things like that? It was rather apparent to both of us what it would amount to in other circumstances the stealing of property would not be right, so I don't think we discussed it back and forth.

Mr. Leibowitz: All right, I will be satisfied with that answer.

Q. Mr. Matthews, your ultimate goal was achieved, was it not; that was the arrest of Mr. Schneider?

A. My ultimate goal, sir, I think was to enforce the law if there were violations there of it.

Q. Well whatever was planned was not to enforce a law, was it?

Mr. Angland: Just a minute. I will object to that, your Honor. I think the evidence can be

(Testimony of John J. Matthews.)

weighed by the jury to determine whether or not that was true or not.

The Court: I will sustain the objection to that question. [276]

Q. Well if you wanted to enforce the law, couldn't you have said to Mr. Schneider: "Now, look, these things are not right." And then he would not have done it and the law would have been enforced the proper way?

Mr. Angland: Just a minute. We object to that. That isn't the law on the matter at all and it is argumentative.

The Court: Sustain the objection.

Mr. Leibowitz: I will take an exception to that.

The Court: All right, take an exception.

Q. Mr. Matthews, you don't know of your own knowledge whether the instructions in the plans that you had with Lieutenant Apperson were complied with?

A. Were what, sir?

Q. Were complied with?

A. Not from my own knowledge as to all of them.

Q. You don't know, Mr. Matthews, whether the admonition with reference to the origin of a bribe was complied with?

A. To my own personal knowledge I do not, sir.

Q. Did you take into consideration, Mr. Matthews, and did you discuss it as part of your instructions the possibility that Mr. Schneider may

(Testimony of John J. Matthews.)

not bite, so to speak? Did you understand that question, bite? A. I did, sir. [277]

Q. All right?

A. And the commission did not enter into our discussions at all.

Q. Go ahead?

A. In other words, it wasn't a question of biting or not; it was a question of obtaining evidence in the event Mr. Schneider were to violate the law.

Q. Of course, you know something about the law of entrapment, don't you? A. Something.

Q. And you try to skirt around it as much as you can in your instructions?

Mr. Angland: Just a minute. Argumentative.

The Court: Sustain the objection.

Mr. Lamb: Be fair to the witness.

Q. Mr. Matthews, not only were you a lawyer but you also called in Mr. Lamb and you wanted to make sure that if Mr. Schneider is ultimately arrested the evidence against him would be such that there would be a conviction?

Mr. Angland: Now, just a minute——

The Court: Yes, I will sustain the objection to that question too. That is an improper question.

Mr. Leibowitz: I have an exception to that?

The Court: Yes, take it.

The Court: Your object was to comply with the law, Mr. Matthews, wasn't it?

A. That is correct, your Honor. [278]

The Court: You had no vindictive feeling against this defendant or anybody else?

(Testimony of John J. Matthews.)

A. None whatsoever, sir.

Q. (By Mr. Leibowitz): Mr. Matthews, you were very cautious in your instructions to Lieutenant Apperson that he shouldn't make any ovations, as he called it, to Mr. Schneider, isn't that so?

A. I exercised care in instructing him, sir.

Q. You were very careful to emphasize that fact to him? A. Yes, sir.

Q. You knew that it was necessary as part of your case that the thought should come from Mr. Schneider rather than from Lieutenant Apperson?

Mr. Angland: Just a minute, Mr. Matthews. We object to the form of the question, your Honor. There isn't any testimony by this witness that he was trying to punish Mr. Schneider.

Mr. Leibowitz: It is not suggestive.

Mr. Angland: That question suggests that very thing. It is suggestive of that very situation.

Mr. Leibowitz: I don't think the question suggests it at all.

Mr. Angland: It is an attempt on the part of defense counsel to avoid the court's ruling is the exact intention. [279]

Mr. Leibowitz: I think it is a fair question and follows the other question; nothing improper about that. He stated he emphasized very carefully that fact to Lieutenant Apperson that he shouldn't start anything but let the thing be started by Mr. Schneider, and I am just following it right through.

(Testimony of John J. Matthews.)

The Court: If he has answered that question, let it stand.

The Court: You gave him instructions as to the law in accordance with your advice given you by the United States Attorney to see that the law was complied with and there was no violation of it on your part anywhere?

A. That is true, your Honor.

The Court: Yes. What do you suppose an officer is appointed to do; to investigate and carry out the law. You are going into this.

Mr. Leibowitz: Of course, the crime had not been committed yet at that time.

The Court: The inferences you draw are not fair to the witness.

Mr. Leibowitz: May I have an exception to the remarks of the court?

The Court: Certainly you may have them; a dozen if you want them. [280]

Q. (By Mr. Leibowitz): Mr. Matthews, did you tell Lieutenant Apperson to put in front of Mr. Schneider a list of materials as contained in Plaintiff's Exhibit—what is it?

Mr. Lamb: I don't know. The exhibits are up there.

Q. Plaintiff's Exhibit 12?

A. No, sir, I did not.

Mr. Angland: What was the answer to that question?

A. No, sir, I did not.

(Testimony of John J. Matthews.)

Q. Did Lieutenant Apperson tell you that he had put that list in front of him as the starting point, after later on in the evening when you saw him?

A. Yes, several days later Lieutenant Apperson related to me substantially the same story including this he related today.

Q. Did you ask Lieutenant Apperson whether he started anything, whether he originated anything?

Mr. Angland: Just a minute. We will ask he fix the time when he asked Mr. Apperson whether he started anything.

Q. On November 23rd is the only time we have.

A. I don't recall, sir, exactly what I did ask Lieuteant Apperson except for the facts of the case, or I did ask him quite specifically about the facts of the case.

Q. Well weren't you concerned very much with the initiation of the negotiations?

A. I personally was not concerned. My job was to find [281] the facts.

Q. To find out whether you had a case so that the law can be enforced?

A. My interest, sir, is to get the facts as they develop.

Q. I haven't asked you that question.

A. Maybe I had better have the question repeated, sir.

Mr. Leibowitz: It's all right.

(Testimony of John J. Matthews.)

(Question read.) Q. To find out whether you had a case so that the law can be enforced?

A. I was not, sir.

Q. You didn't care if the thought came from Mr. Apperson, is that what you say now?

A. I say I was not concerned about——

Q. Well you were interested?

A. I was interested, sir.

Q. And you wanted to follow to find out if your instructions were followed in that respect anyway?

A. Yes, sir, I guess I was.

Q. And you interrogated with reference to that?

A. I did, sir.

Q. Then he told you, did he, that he put that file in front of him and kept his mouth shut?

Mr. Angland: Just a minute. What he told this witness, what Apperson told this witness after the crime is committed is unimportant, immaterial and incompetent so far as [282] the jury is concerned. The witness Apperson has just testified in person and what conversation he had with Mr. Matthews after the alleged offense occurred and any statement then would not be competent evidence now.

The Court: Well I think very likely your objection is good.

Mr. Leibowitz: All right, I will have my exception.

Q. Did you at any time after the arrest or during the pendency before the arrest ask Lieutenant Apperson how the thing is coming along?

(Testimony of John J. Matthews.)

A. Yes, sir, I did.

Q. You did? You were very very anxious, weren't you, to enforce the law?

Mr. Angland: If it was violated. Just a minute. We object to that question.

A. If it was violated.

Q. If it was violated, weren't you? At the time you asked him how the thing was coming along no law was violated yet, was it?

A. Sir, I didn't ask him how the case was going.

Q. Well how the thing was progressing?

A. I asked him some questions concerning the case and that is the only occasion I saw him further, and that is with Mr. Schneider on the afternoon of the 23rd.

Q. All right? [283]

A. That occasion occurred in the men's room of Murrills Lounge. I asked him merely where he was going, or words to that effect, and that was the extent of my inquiry, sir.

Q. At that time no money was paid; you knew that?

A. I knew that sir. I suspected that, sir.

Q. You saw him there?

A. He didn't give us the signals pre-arranged for.

Q. He didn't give you any signals?

A. No.

Q. So you knew the money hadn't been passed yet?

A. That is right.

(Testimony of John J. Matthews.)

Q. But you were still concerned with enforcement of the law? A. Yes, that was my job.

Q. That is your job. You didn't place Mr. Schneider under arrest at that point, did you?

A. At which point was that, sir?

Q. Right in the men's room. Mr. Schneider was there, wasn't he? A. He was, sir.

Q. Well why didn't you place him under arrest?

A. I had no reason for placing him under arrest.

Q. You mean no crime had been committed yet?

A. I am not in a position to draw those conclusions, sir; we have the authority from the United States Attorney to decide whether or not we shall arrest a man unless we actually catch him in the commission of a felony, and I [284] hadn't been advised by the United States Attorney to make the arrest of anyone at that particular point.

Q. When the car was loaded and after it was loaded and the stuff was put on the car and wasn't paid for you didn't put Mr. Schneider under arrest at that point?

Mr. Angland: Just a minute. I don't think this witness has testified, your Honor, whether he knew when the car was loaded.

Mr. Leibowitz: He said he was right there at the time.

The Court: He did not. He did not know the details in reference to it.

Q. (Bp Mr. Leibowitz): Didn't you, Mr.

(Testimony of John J. Matthews.)

Matthews, testify you were there when they were loading the car?

A. No, sir, I don't believe I did.

Q. Were any of your men there?

A. I doubt it.

Q. In other words, the loading of the car took place in your absence? A. That is correct, sir.

Q. Did you know that the car was loaded, when it was loaded?

A. Not until late in the evening of the 23rd.

Q. And then you knew it when Lieutenant Apperson went out of the Air base with Mr. Schneider, didn't you? [285]

A. I didn't know it then, sir.

Q. Didn't you follow his car?

A. I followed his car.

Q. Did you follow it before the car was loaded?

A. I didn't know what happened to the car. I didn't even see the car. At the point at which I was located at the Base was some distance away from the car and I didn't see the car except on the occasion when I first went there.

Q. Let's understand you. Do you mean to say to this jury you didn't know that car was loaded when you followed Lieutenant Apperson and Mr. Schneider late at night on November 23rd out of that Airbase?

A. I didn't even see the car, sir. It had been reported to me that the car was being loaded. That came in a round-about way from the O.S.I.

(Testimony of John J. Matthews.)

Q. But you were anxious to know whether it was loaded anyway? A. I don't believe I was, sir.

Q. You wanted to know it was being loaded, you were curious anyway? A. I was curious.

Q. All right, now you knew just as soon as that stuff was loaded in the car and Mr. Schneider was not going to pay for it that he violated a law right there so that you can put him right under arrest?

Mr. Angland: Just a minute. [286]

The Court: Wait a minute. That is a very improper question. How do you know, how can you assume that he knew that the law was violated or that he was not to pay for it?

Mr. Leibowitz: Well, if the Court please, on a pre-arranged plan then he knew what was taking place.

The Court: I will object to the question if counsel don't.

Mr. Lamb: The witness testified he didn't.

Mr. Leibowitz: All right, I will have my exception.

Q. (By Mr. Leibowitz): Did Mr. Lamb tell you that Mr. Schneider should not be put under arrest until he actually paid the money?

A. Words to that effect he did, sir.

Q. Did you think, Mr. Matthews, that the crime had not been committed in the absence of payments of any money?

Mr. Lamb: To which we object.

Q. In other words, is it necessary to enforce the

(Testimony of John J. Matthews.)

law by having money passed from Mr. Schneider to Mr. Apperson?

Mr. Angland: Just a minute. That is asking this witness to interpret the law; that is what the Court does. This witness further testified he acts on the advice of the United States Attorney's office.

The Court: I will sustain the objection.

The Court: You can take another exception, Mr. Leibowitz. [287]

Q. Of course, you didn't know, Mr. Matthews, whether Mr. Schneider had paid for the merchandise or not?

A. I didn't know that, sir.

Q. Did you know whether the stuff from 1045 had been put on the car or not?

A. I didn't know that either, sir.

Q. As far as your knowledge went it might just as well be the only thing that was put on the car was the stuff he legitimately purchased and paid for?

A. Yes, sir, other than what Lieutenant Apperson told me.

Q. And it may very well have been while you were running along after him he might have been completely anxious——

Mr. Lamb: To which we object on the grounds there is no evidence now before this court that John Matthews, the agent now on the stand, was running after——

Q. Or trailing or tracking——

(Testimony of John J. Matthews.)

Mr. Lamb: Or trailing or tracking or anything else.

The Court: Sustain the objection.

Q. Mr. Matthews, are you familiar with the law of bribery? A. To some extent, sir, I am.

Q. Do you know the penalties? Just yes or no. I am not going to ask you for them.

A. Yes, sir.

Q. In other words, you knew, Mr. Matthews, that the penalty and so far as the fine is concerned is proportionate or bears a certain relationship to the amount of money that [288] is passed from the defendant to the officer, you know that?

A. I do, sir.

Q. Were you interested, Mr. Matthews, to try and have Mr. Schneider pass as much money as possibly could be passed? A. Not a bit, sir.

Mr. Angland: Just a——

The Court: He answered the question; let it stand.

Q. Did you tell Mr. Apperson about getting as much as he possibly can out of Mr. Schneider?

A. No, sir.

Q. Did you? A. No, sir.

Mr. Leibowitz: All right, that is all.

Mr. Lamb: That is all, Mr. Matthews. Thank you. Call Mr. Leonard.

The Court: We will have to give the reporter a few minutes. (4:40 p.m.)

(Testimony of John J. Matthews.)

(Court resumed, pursuant to recess, at 4:45 o'clock p.m., at which time the jury, defendant, and all counsel were present.)

The Court: Personally, gentlemen, I think this reporter has had enough work today. We will suspend now.

(Whereupon the Court admonished the jury.)

The Court: Court is adjourned until tomorrow morning at 10:00 o'clock. (4:47 p.m., December 14, 1949.) [289]

Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on December 15, 1949, at which time the jury, defendant, and all counsel were present.

The Court: Gentlemen, are you ready to proceed?

Mr. Lamb: The Government is ready, your Honor.

The Court: Call your next witness.

Mr. Lamb: Yesterday Lieutenant Fenton was requested by defense counsel to secure further information. I have Lieutenant Fenton if you care to examine him.

The Court: What was that?

Mr. Lamb: Request was made by defense counsel and I have Lieutenant Fenton available.

The Court: Very well, do you want to question him about this?

Mr. Leibowitz: Yes, your Honor.

LT. ALBERT J. FENTON

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Leibowitz:

Q. Lieutenant Fenton, have you made a search pursuant to the request made to you?

A. I have.

Q. And what have you found?

A. Specifically what do you want

Q. Well, whatever you did find? [290]

A. I found that tolls for that particular call was not paid for by the Government.

Q. Did you find who made the call?

A. And I found that the call was made as stated on the toll ticket.

Q. By Mr. Apperson, Lieutenant Apperson?

A. That is correct.

Q. Did you find from what number the call came from?

A. Yes, it was as stated, 224 on the toll ticket.

Q. There is no record in your office of a call coming to you from 9597, is there, Great Falls?

A. No, sir, there is not.

Q. And that call made on that date is when?

A. Sir?

Q. Do you recall the date when it was made?

A. 16th of November, 1948.

Q. It is the only record of a call made on the 16th from your office?

A. Sir?

(Testimony of Lt. Albert J. Fenton.)

Q. That is the only record of a call?

A. No, sir. We have many records of calls on that date. That is the only one that applies to Lieutenant Apperson.

Q. None on November 15th? A. No, sir.

Mr. Leibowitz: All right, that is all.

Mr. Lamb: Now if the Lieutenant may be excused; he has duties at the Airbase?

The Court: Very well. [291]

The Court: How about that slip? Have you offered it?

Mr. Lamb: Yes, I offered it on two or three different occasions. At this time I offer Exhibit No. 11.

Mr. Leibowitz: May we have that letter from New York introduced, too?

The Court: I don't know what that letter has to do with the case. It must refer to somebody else or some other person. It certainly doesn't have reference to this call.

Mr. Leibowitz: All I can say is I got the letter from the New York Telephone Company, and whatever it is worth it may be submitted to the jury.

The Court: It may be admitted.

Mr. Lamb: Your Honor, the Government has objected to the introduction of that particular letter on the grounds the proper foundation has not been laid.

The Court: I overlooked the reason. I will not admit it. I will overrule the objection.

(Testimony of Lt. Albert J. Fenton.)

Mr. Leibowitz: All right, I will take an exception.

The Court: What is this?

Mr. Lamb: Plaintiff's Exhibit No. 11.

The Court: That may be admitted in evidence.

(Whereupon said Plaintiff's Exhibit No. 11, offered and received in evidence, is a part of this record.) [292]

ROBERT M. LEONARD

was called as a witness for plaintiff, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. State your name, please.

A. Robert M. Leonard.

Q. What official position do you occupy with the United States Government?

A. I am a special agent with the Federal Bureau of Investigation.

Q. And where are you stationed?

A. In Butte.

Q. And how long have you been engaged as a special agent of the Federal Bureau of Investigation?

A. Since May of 1947.

Q. And in November, 1948, were you called to the city of Great Falls in the performance of your duties of Federal Bureau of Investigation agent?

(Testimony of Robert M. Leonard.)

A. I was.

Q. And particularly on November 24th, 1948, did you have occasion to go to the Great Falls Airbase adjacent to the city of Great Falls?

A. I did.

Q. And did you go to a freight car appearing there for the purpose of unloading and taking an inventory of its contents?

A. I did.

Q. I will show you an instrument which has been marked Plaintiff's Exhibit 14 and ask you if you have seen this [293] instrument before?

A. Yes, I made this out.

Q. And where and what date?

A. That was on the 24th of November, 1948, at the Airbase here at Great Falls.

Q. Does that paper relate to the materials contained in the box car at that time?

A. Yes, this is a——

The Court: You mean, of course, the Army Airbase?

A. Yes.

The Court: You spoke of the Airbase; there is more than one base.

Q. Yes, Great Falls Army Airbase?

A. Yes. This is a list of the boxes, cartons and so forth that we removed from the boxcar and placed back into the——

Mr. Leibowith: I object to that. He was asked if he took a record and not what he removed from the car.

(Testimony of Robert M. Leonard.)

The Court: Very well, sustain the objection.

Q. And this Plaintiff's Exhibit 14 is in your handwriting? A. It is.

Q. And at the time you went to the Great Falls Army Airbase adjacent to the city of Great Falls what did you and others do as far as the loading or unloading of the box car?

Mr. Leibowitz: Let's have the date first. [294]

Mr. Lamb: The date is already in, November 24th.

Mr. Leibowitz: The 24th—Your Honor, I object to that as not binding and not relevant and not material; what happened later on.

The Court: Just a minute. I see a point, I think, and I think you ought to show there hasn't been any change in that material and stuff loaded there from the time it was loaded until the time of his inspection and taking a list of it. There is quite a lapse of a good many hours, and I think that ought to be accounted for in some way, show there was a guard there or other changes made or had occurred.

Mr. Lamb: Your Honor, I might state that the inventory as shown on the turn-in slips——

The Court: What is that?

Mr. Lamb: There is an inventory in evidence of the turn-in slips of the articles that went into the boxcar.

The Court: Yes, that is in evidence. That shows what was put in there and loaded under the defendant's direction. That is the testimony.

(Testimony of Robert M. Leonard.)

Mr. Lamb: And this witness is prepared to testify what came out of the boxcar.

The Court: Well, if more came out or less came out than shown by the inventory that went into it, how are you going to account for it? Is it a fact that list shows less came out than went in or more came out? [295]

Mr. Lamb: Same amount.

The Court: Same amount. You have got it both ways, you have got it by the slip allegedly made by the defendant and the actual unloading.

Mr. Lamb: I will offer Plaintiff's Exhibit 14 in evidence at this time.

Mr. Leibowitz: I object to it on the ground not a proper foundation has been laid. There is no proof what happened in between the loading of the car and unloading.

The Court: Sustain the objection.

Mr. Lamb: You may cross-examine.

Cross-Examination

By Mr. Leibowitz:

Q. Mr. Leonard, you say you are connected with the F.B.I. out of Butte? A. That is so.

Q. And you were called into the case when?

A. On the afternoon of November 22nd.

Q. And you were called in by whom?

A. By whom?

Q. By whom?

(Testimony of Robert M. Leonard.)

A. I was assigned by the Special Agent in charge of personnel.

Q. Who?

A. Special Agent in Charge, Guy W. Bannister of the F.B.I. office in Butte. [296]

Q. And he asked you to go down to Great Falls and see Mr. Matthews, did he, and then did he tell you to go down to the Great Falls Airbase?

A. I am sorry I don't understand your question.

Q. I asked you if—what is his name again—Mr. Bannister, did you say? A. Yes.

Q. Assigned you to go down to see Mr. Matthews first or did he tell you to go down to the Great Falls Airbase?

A. I was to report to the residence agency here in Great Falls.

Q. And that was Mr. Matthews who was in charge?

A. No, at that time there was nobody particularly in charge of a residence agency. There's certain men work as residence agents, but nobody was in charge especially.

Q. Well, when you had the assignment you knew you were coming here for some specific purpose, didn't you?

A. Not specifically. I had been assigned to a case.

Q. Did Mr. Bannister tell you that a crime has been committed or is going to be committed or something is going to happen here and you should go

(Testimony of Robert M. Leonard.)

down to Great Falls to cooperate with the F.B.I. here; is that what he told you? A. No.

Q. Did Mr. Bannister tell you to come down here to lock somebody up? A. No.

Q. Well then, you came to Great Falls, didn't you? A. Yes. [297]

Q. And where did you go?

A. To the residence agency here.

Q. After you got here did you talk with any man connected with the F.B.I. after you came here?

A. Yes, I did.

Q. Did you talk to Mr. Matthews? A. Yes.

Q. Did you talk to anybody else in connection with the Schneider case? A. Yes, I came up.

Q. Now we are talking about the 22nd of November? A. Yes.

Q. Now after you consulted with Mr. Matthews did Mr. Matthews make any particular assignment for you or were you on your own?

A. It was rather a mutual venture. There was no specific assignment that he gave me, no, sir.

Q. Well, did he tell you anything about the Schneider case? A. Yes.

Q. He told you what was being planned, didn't he? A. Yes.

Q. Well, let us have your conversation; what did he tell you about this plan? A. Pardon.

Q. Tell us what he told you about the plan with reference to Meyer Schneider?

(Testimony of Robert M. Leonard.)

A. He stated that he had received information to the effect that Meyer Schneider had—— [298]

Q. I just wanted to know what the plans were that you arranged with Mr. Matthews?

Mr. Angland: Just a minute. Your Honor, he asked a question. The last question asked was a direct inquiry of this witness. The witness is entitled to give him a response to that question, and if the reporter will ask the preceding question that the witness started to answer, I think he should be given an opportunity to answer that question.

The Court: He should.

Mr. Leibowitz: I am giving him the opportunity; I just don't want to confuse him.

The Court: Let the reporter read the question.

(Question read.)

Q. Tell us what he told you about the plan with reference to Meyer Schneider?

Mr. Leibowitz: Now about the plan; no more. Now that is the question.

A. He stated that the case involved a reported offer of a bribe.

Mr. Leibowitz: I haven't asked you that, Mr. Leonard. I move to strike it out.

Mr. Angland: He asked about the plan, your Honor.

The Court: All right, that is the plan. This is preliminary or introductory to it and something would have to be said about that, wouldn't it? Go ahead and tell it. [299]

(Testimony of Robert M. Leonard.)

A. He said that a complaint had been received relative to a bribe that had been offered on the Army Airbase to an officer in charge of salvage. He stated that——

Mr. Leibowitz: Well, of course, I object to all that as not responsive to my question, your Honor.

The Court: You are asking for the plan.

Mr. Leibowitz: That is not the plan so far as I can see so far.

The Court: Well, it looks like it to me.

A. He stated that the officer involved had reported the bribe or the offer of the bribe and that the support of the—and with the knowledge of the Army officials that the officer was going to accede to any request or plans that were made in relation to such offer by Meyer Schneider. We had to make several plans. We did not know, of course, what the action would take place, and it was something of which I had very little knowledge and Mr. Matthews had very little concerning what would actually take place, so our plans were laid with several contingencies. We thought that possibly that if a bribe was to be passed, it would be passed on the Army Airbase, in which case there was not much that we could do to gain any direct evidence; in other words, that we could see or hear anything that would take place if such a contingency come to pass. On the other hand, we thought that should the bribe be made, money passed enroute from the Airbase to [300] town. We had received word from

(Testimony of Robert M. Leonard.)

the Lieutenant, Mr. Matthews, had the previous evening that they might come to dinner in town. I believe Mr. Schneider had invited him to dinner and he thought he would accede to that invitation. The second possibility then was that money would be passed, if it was to be passed, enroute from the Airbase to town. Now we thought it likely that they would come in the Lieutenant's car. He had a car available and that seemed the likely form of transportation. So we planned that when that car left the Base we would follow it if Meyer Schneider was accompanying the Lieutenant, Apperson, the officer involved. The other plan, the third contingency that was worked out tentatively—it was all on a highly tentative basis—was that it might be passed in a bar or a restaurant. We thought that probably these two gentlemen were going to a bar and then to a restaurant, in which case we thought that we could probably surveil the persons close enough that we could either see the actual passing of the money or hear the conversation leading up to it, maybe both. Another possibility that existed was that it would be passed in the hotel room of Mr. Schneider and that we could surveil to a certain point and beyond that we could not. Those roughly were the plans that were made in the preliminary discussions between myself and Mr. Matthews.

Q. That was on the 22nd you formulated these plans?

(Testimony of Robert M. Leonard.)

A. Well, it was on the 22nd and maybe into the morning of [301] the 23rd.

Q. Now of course all your plans depended on one thing, that the merchandise would be loaded on the car, is that so?

A. No, I don't believe absolutely necessary if the bribe money passed, if a bribe passed.

Q. Did you take into consideration the fact Mr. Schneider would not pass money without having the merchandise delivered and put on board a car?

A. We took into consideration affirmatively the possibility that such would be the case. We did not think it likely, however, that was a contingency we looked forward to.

Q. That Mr. Schneider would pay even though he would not get possession of any merchandise or any merchandise would be placed?

A. We thought of that possibility, yes, and our plans were flexible enough to take that into consideration.

Q. And if that happened, then what if no merchandise were put on the car and Mr. Schneider gave Apperson some money, then what would you or what was the plan if that contingency occurred?

A. The plan was that we should do as we did. The actual bribery was the offense that we would act on.

Q. I asked you the question and you stated before that you took into consideration that money may be passed by Schneider to Lieutenant Apperson

(Testimony of Robert M. Leonard.)

without any merchandise [302] being put on the car and I then followed and asked you would you have done then if that would take place?

A. Well, I think your question was——

Q. Well, that is my question.

Mr. Angland: Just a minute. We submit, your Honor, that the witness is entitled to state his understanding of the question that he is giving a response to.

The Court: Well, did you understand the question, Mr. Leonard?

A. Well, my point is, your Honor——

The Court: The question is did you understand it?

A. That I didn't understand whether he was referring to what had been done or what our plan was should this contingency come to pass. That is the question in my mind. Now which one of those is the question?

The Court: That contingency didn't come to pass, did it?

A. No.

The Court: I don't see why we should talk about it or what right you have to investigate when the contingency didn't come to pass.

Mr. Leibowitz: I asked about the plan and he said that contingency came in their plans and I wanted to find out.

(Testimony of Robert M. Leonard.)

The Court: If you understand his inquiry, you may answer it. [303]

A. Our plans didn't go so far as to detail any definite action. We did not know. It was so indefinite that while we thought of those contingencies we didn't necessarily make answers to them.

Q. That is your best answer?

Mr. Lamb: That is what he has given you.

Q. That is your answer, is it?

A. That is my answer, yes.

Q. Did you also take into consideration that should the merchandise be loaded and paid for by Mr. Schneider then what would have happened? Let us assume that the merchandise from 1045, warehouse 1045, was loaded and Mr. Schneider attempted to pay for the merchandise, did you take that into consideration?

Mr. Angland: Just a minute. That question is objected to as being ridiculous.

The Court: It is not based on the facts of this case at all.

Mr. Leibowitz: I am trying to find out. Maybe Mr. Schneider paid for it or wanted to pay for it. I don't know.

The Court: Well, it is in evidence what occurred. You know that. We all heard it.

Mr. Angland: This officer isn't called upon to state what he might do if the law is complied with; of course, [304] he would go about his business and do his job.

(Testimony of Robert M. Leonard.)

The Court: It is going into the realm of speculation.

Q. Mr. Leonard, on the 21st day of September you were stationed at the Airbase?

A. I was present.

Q. Were you present at the time the stuff was being loaded? A. I couldn't testify to that.

Q. I asked you if you were there at the time the stuff was being loaded?

A. I don't know. From personal knowledge when it was loaded?

Q. All right, did you see a car there?

A. Yes.

Q. And from where did you see it?

A. From an automobile driving past it from 25, 30 yards away, maybe.

Q. Did you stop there? A. No.

Q. And, of course, you didn't know that car had any association with the Schneider case at all, did you?

A. I was told. I did not know from personal knowledge.

Q. Did you see, do you know where warehouse 1045 is?

A. I wouldn't be able to find it, no.

Q. Did you see warehouse 1045? A. Yes.

Q. Did you see any stuff going out of 1045?

A. No.

Q. Did you see any trucks being driven from 1045? A. No.

(Testimony of Robert M. Leonard.)

Q. Wait a minute. Towards the railroad? [305]

A. I didn't see any truck near 1045.

Q. So as far as you can say there is nothing you know about the merchandise being put on the car from 1045 warehouse into the car, do you?

A. No.

Mr. Leibowitz: That is all.

Mr. Lamb: That is all.

ROBERT ZIEGLER

was called as a witness for plaintiff, and having been duly sworn, testified as follows:

Direct Examination

By Mr. Lamb:

Q. Your name is Robert Ziegler?

A. Robert Ziegler, yes.

Q. And what is your business, Mr. Ziegler?

A. I work for the Milwaukee Railroad as a clerk.

Q. As a clerk? A. Yes.

Q. And are you the official custodian of the records pertaining to freight cars that may be ordered and shipped and so forth? A. I am.

Q. Do you have those records with reference to a freight car spotted upon the great Falls Army Airbase adjacent to the city of Great Falls on the 23rd day of November, 1948? A. I do.

Q. Mr. Ziegler, I will show you a group of three papers [306] marked Plaintiff's Exhibit 15, and ask

(Testimony of Robert Ziegler.)

you if those pertain to the freight car which was spotted by your railroad company at the Great Falls Army Airbase on November 23, 1948?

A. Yes, they do.

Q. And do these instruments reflect the consignee of the car and the other details pertaining to the records?

Mr. Leibowitz: I object to the question as being leading. Mr. Eickemeyer: If the Court please——

Mr. Lamb: Will you wait until I finish my question?

Mr. Leibowitz: I am just telling you it is a leading question.

Mr. Lamb: If you will please wait until I finish the question; there are a few courtesies even in Montana.

Mr. Leibowitz: I see. In New York City——

The Court: I don't want to hear any more. Just stop right here. Or you either, if you are referring to that.

Mr. Eickemeyer: No, I am referring to the remarks of counsel.

The Court: I don't want you to make any reference to it.

Mr. Eickemeyer: We take an exception to it.

The Court: Very well, you will take the exception and sit down.

By Mr Lamb:

Q. Mr. Ziegler, do the records contained in Plaintiff's [307] Exhibit 15 contain all the records

(Testimony of Robert Ziegler.)

pertaining to the boxcar in question showing the consignee, destination and date of shipment of the car?

Mr. Leibowitz: I object to the question as being leading. I think it is for the witness to state what that document states and not for Mr. Lamb to tell him what it states.

The Court: Well, you can put in "whether or not." I will sustain the objection. You can ask the question "whether or not." See if he will object to that.

Q. Whether or not do the records here contain all of the information which your railroad has concerning the consignee, the destination, the date of spotting, and the number of the car, and the place to which it is shipped?

A. They do.

Mr. Lamb: At this time we will offer in evidence Plaintiff's Exhibit 15.

Mr. Leibowitz: No objection.

The Court: It may be received in evidence.

(Whereupon said Plaintiff's Exhibit No. 15, offered and received in evidence, is a part of this record.)

(Whereupon Mr. Lamb read Plaintiffs' Exhibit No. 15 to the jury.)

By Mr. Lamb:

Q. Mr. Ziegler, referring to this last page, what is [308] the instrument of which this is a copy?

(Testimony of Robert Ziegler.)

A. That is a copy of a waybill made that goes with the car in transit that the car moves on.

Q. The original waybill goes with the car in the possession of the conductor of the freight train?

A. That is right.

Q. And this is the record which at the point of shipment is maintained by your railroad company?

A. That is right.

Q. And what do the initials B & M stand for?

A. Boston & Maine.

Q. And the number appearing thereon is what number, adjacent to the B & M?

A. That is the number of the car itself.

Q. Just like a license number?

A. That is right.

Q. And the B & M means Boston and Maine and does that mean it is a Boston & Maine freight car?

A. That is right.

Mr. Lamb: You may cross-examine.

Cross-Examination

By Mr. Leibowitz:

Q. Mr. Ziegler, before your railroad would be permitted to send a car up to the Airbase some confirmation was necessary from some officials at the Airbase, is that so?

A. That is right. [309]

Q. In other words, you couldn't send anything insofar as a car is concerned unless you had the absolute authority from some office in charge at the Airbase?

A. That is right.

(Testimony of Robert Ziegler.)

Q. So that when the car did come out it came out because you were authorized to send the car out?

A. That is right.

Q. And whatever information appeared with reference to the use of it, of course, and the contents that may be loaded on that car came from some official from the Government? A. It did.

Q. Now that car had a capacity for how many pounds?

A. Well, I don't know for sure. I couldn't say because that varies on all cars.

Q. Is there anything from this exhibit here that could give us some idea?

A. Nothing indicated, no.

Q. Do you know whether a request had been made for a small car or a large car or what type car?

A. Forty-foot was specified.

Q. And that would carry how many pounds?

A. They vary, 80,000 and 40,000, and——

Q. Depending upon the type merchandise and the bulk? A. That is right.

Q. Now when it says here "consigned to M. Schneider Company," that information came to you from some, or it was complete from some official at the Airbase?

A. Are you speaking of the car order or the bill of [310] lading?

A. Well, whatever you have here. I don't know which.

(Testimony of Robert Ziegler.)

A. This one was given to me by the officer at the Airbase.

Q. And the bill of lading?

A. That was presented to our office by an officer from the Airbase.

Q. And of course you wouldn't know whether M. Schneider or M. Schneider Company is in charge of that particular stuff, would you?

A. I don't know either way.

Q. Now on the last page of the exhibit there is a date, November 27, 1948. Can you tell us from that last page how many pounds had actually been put on that car? Is that it here?

A. That is the actual weight, 16,000.

Q. Actual weight of the stuff in there?

A. That is right.

Q. 16,015?

A. As given to us on the bill of lading.

Q. Of course, you didn't check that, did you?

A. No, we didn't.

Q. And your company doesn't check that?

A. No, we don't.

Q. And you don't know whether 16,015 actually were in the car or not? A. No. [311]

Q. There may have been less?

A. I have no way of telling.

Q. And there may have been more. Now when it says "rags" you assumed it was rags, or do you check it or does the company check it in any way?

A. No, we do not.

(Testimony of Robert Ziegler.)

Q. You accept it as such? A. Yes.

Q. Do you assume it will be checked by some officer at the Airbase as to correct details here?

A. As to the contents.

Q. As to the contents?

A. Yes, that is right.

Q. Of course, you don't question what the officials of the Airbase tell you as to the contents?

A. That is right.

Q. And they told you that November 22, 1948?

A. That is right on the car order there.

Q. Yes. I don't want to mislead you.

A. That is right.

Q. And is that right then here? A. Yes.

Q. And is that the end? A. Yes.

Q. Now after you received the order can you tell us from anything here when the car arrived at the Airbase?

A. It's the date at the righthand side. That 8:00 a.m. doesn't mean——

Q. 11/23? A. That is the date.

Q. And did you say something about the hour? [312]

A. That 8:00 a.m. is used on any car started after 7:00 a.m., as that is the start of the day.

Q. It may be 4:00 o'clock, 3:00 o'clock, 2:00 o'clock and still you would mark it as 8:00 o'clock?

A. That is right.

The Court: What date?

Mr. Leibowitz: 23rd.

(Testimony of Robert Ziegler.)

Q. Now is your company through as far as its duties and functions with reference to the delivery of the car just as soon as it brings the car to the Airbase?

A. You mean as far as filling a car order?

Q. Filling the car order? A. That is right.

Q. Your man isn't there to see whatever stuff goes in there?

A. No, there is no one there from the railroad.

Q. Until the car is actually shipped from the Base back to New York City in accordance with the order here you don't know just what came into the car and what went off the car, whether they put on 40,000 pounds of cotton stuff or they tried to comply with the regulations, do you?

A. No, I have no idea.

Q. Would anybody from your company know?

A. To my knowledge none were present.

Q. Now on the 23rd of November after the car had been brought to the Base and the stuff loaded did your company [313] make inquiries as to the removal of that car to New York City?

A. No, we never make any inquiries as to the readiness of the car.

Q. You don't know anything whether it stays there a year or half a year?

A. We would question it if it was any indefinite time, figuring there might be an error on our part.

Q. So an inquiry would be made by you people?

A. Yes.

(Testimony of Robert Ziegler.)

Q. Did you make inquiry in this case?

A. No, we didn't because there wasn't any length of time involved.

Q. That car didn't go out on the 23rd of November, did it?

A. I can't say as to that. You mean to the Airbase?

Q. From the Airbase? A. I couldn't say.

Q. Is there anything on this paper that would indicate when it went out?

A. Not when it was pulled from the Base, there is nothing there.

Q. Well, let me show you the last page of the exhibit and ask you what this November 27th means?

A. That is the day the car was billed at our freight office.

Q. Which means what? [314]

A. Which means it was billed on that day. It could have been pulled from the Base the day before or day after.

Q. Could it have been pulled from the Base November 23rd?

A. I couldn't say until I check the records.

Q. Well, the only time that you would put the amount right here is when this information came to you that the car had already been what?

A. That bill of lading you have in your hand is presented to us and that means the car is ready to move.

Q. And what date is on that billing?

(Testimony of Robert Ziegler.)

A. November 26th.

Q. Now when that bill of lading on the 25th of November was presented to you did you make any inquiries the reason why the car was ordered on the 23rd and not removed until the 26th?

A. We received a call prior to that date not to remove it until we got orders to remove it.

Q. Was it an F.B.I. order, as far as the car?

A. As far as the moving of the car.

Q. And you complied with the instructions of the Federal Bureau of Investigation? A. Right.

Q. And if you were asked by the consignor, Mr. Schneider, that you remove the car on the 23rd day of November, you wouldn't under any circumstances remove it? [315] A. We would not.

Q. And on the 26th of November, 1948, when the car was actually removed it was removed pursuant to the instructions of the Federal Bureau of Investigation? A. That is right.

Q. There was no demurrage here, was there?

A. No, there was no demurrage charged to the car.

Q. And the reason there was no demurrage was because the F.B.I. put its hand on it, otherwise there would have been demurrage?

A. If it had not been released on that date, there would have been.

Mr. Leibowitz: That is all.

(Testimony of Robert Ziegler.)

Redirect Examination

By Mr. Lamb:

Q. Mr. Ziegler, how long after a car is spotted does a shipper have to load a car in normal procedure?

A. He has 48 hours free time and beyond that there is a demurrage charge.

Q. I believe you stated to Mr. Leibowitz that when the car was removed from the Great Falls Air-base that it was pursuant to F.B.I. instructions?

A. That is right.

Q. It was moved from the Base pursuant to those instructions? [316]

A. That is right, because I called and asked if it was okay to move it after the bill of lading was presented.

Q. In other words, the F.B.I. said there is no further need to hold the car and you can move it if you want to?

A. That is right.

Q. Then they didn't instruct you to pull it from the Base?

A. No, they said it was okay to move it.

Q. When did someone from the Federal Bureau of Investigation call you and ask you to hold up removing the car from the Base?

A. I can't say as to the exact date of that.

Q. Now some questions were propounded to you concerning whether your railroad company would know of the exact weight of the commodities in the car, you recall that line of questioning?

(Testimony of Robert Ziegler.)

A. Yes, I do.

Q. After the car is loaded out at the East Base is there any place from the point that it would leave the Airbase that the railroad company, either yourself, yours or any of your connecting lines would ever inspect that car or weigh it for its contents?

A. There would be no one for that.

Q. So may we assume then that in addition to the 16,015 pounds shown upon the bill of lading there could have been in that car, as far as your railroad is concerned, [317] an additional 50,000 pounds of equipment?

A. Yes, there could have been.

Q. Now we find on the bill of lading 16,015 pounds after 24,000 pounds, can you explain that?

A. Well, although there was only 16,015 pounds in the car the rate applied onto it was a minimum of 24,000 which he had to pay regardless of the weight under 24,000.

Q. In other words, if he ordered a forty-foot freight car and put a box of matches in it, he would still have to pay for 24,000 pounds freight?

A. That varies according to the classification of the merchandise to be loaded.

Q. But if he put a couple pounds of cotton and wool rags in the car, he would still pay for 24,000 pounds as a minimum charge?

A. If you ordered it as a carload.

Q. Now I believe you stated in response to a

(Testimony of Robert Ziegler.)

question that your railroad had no further connection with the car after it was spotted, and after the car is loaded then your railroad picks it up at the Base, hauls it to a central point here in Great Falls, and then connects it with east-bound freight if that is the direction the car is routed?

A. That is right.

Q. Now can you refer to your other records and tell us the date that shipment left the city of Great Falls or left [318] the Airbase, put it that way?

A. Was November 28th a Sunday?

Q. I don't know. November 23rd was Thanksgiving; that would be Thursday.

A. The reason I say that the car appears on the yard check of the Airbase for the morning of the 27th and does not appear on the morning of the 29th, which means it was pulled on the morning of the 27th, and if the 28th was not a Sunday, which our switch engine does not work, it was pulled on the 28th.

Q. The 28th is Sunday.

A. We have no switch engine on a Sunday and so the car was pulled on the 27th from the Airbase.

Q. And do you have an records to show when it left the city of Great Falls?

A. I don't have those with me.

Mr. Lamb: That is all.

(Testimony of Robert Ziegler.)

Recross Examination

By Mr. Leibowitz:

Q. Mr. Ziegler, you say that there is no way that your company or railroads generally can check the amount of stuff that is in that car?

A. We never check the contents of a car unless there [319] is doubt as to what is in it.

Q. Now if there is any question in the minds of the railroad company as to whether or not that car had been overloaded and is not paid for, you have a way of checking the weights, haven't you?

A. We would have no reason to see where it was paid for.

Q. I didn't say that. I didn't ask you that. In other words, let's assume as in this case or in any case 16,000 pounds of stuff was stated to you people as gone into that car and actually 100,000 pounds went in and the car began to move and went toward Chicago and even beyond Chicago, before it ever reached New York, do you mean to say that your company or any railroad would not be able to determine how much poundage went into that car?

A. There would be no way of telling.

Q. That is, you don't know if there is a way, do you?

A. Well, I have worked a long time and I have never found one yet.

Q. Don't you know that there is a railroad, an agency that could check that car enroute anywhere

(Testimony of Robert Ziegler.)

along the line at any time they see fit if there was any question as to the weight or contents of the car?

A. If there is any question, yes.

Q. Then there is a way of doing it? All you have to do is tell them that that car should be checked and they [320] will check it.

A. If I would tell them that they would, yes.

Q. That is what I wanted to know; it could be checked?

A. If it was wanted, ordered to be checked.

Q. That is what I wanted; if it was ordered to be checked naturally it could be checked?

A. It could be by the W. W. I. B.

Q. Now we have got something. Now will you explain what the W. W. I. B. means?

A. That is the Western Weighing and Inspection Bureau.

Q. And they will check it for you?

A. If we request it.

Q. Did you request it in this case?

A. We had no need to request it.

Q. Why? A. There was no question.

Q. Because there was no question how much stuff went into that car, is that so? A. Right.

Q. In other words, 16,000 pounds of stuff went into that car and 16,000 pounds were delivered right through to New York City?

A. That I don't know.

Q. Well, it didn't pick up any weight, as far as you know, when it went along?

(Testimony of Robert Ziegler.)

A. I don't know.

Q. Was the car sealed?

A. I have no way of seeing the car after it leaves here.

Q. But they seal the car after it leaves here? [321]

A. That is right.

Q. How can it be opened up again?

A. Those can be easily broken.

Q. By theft?

Mr. Angland: Just a minute. Your Honor, the Court knows a shipment can be stopped in transit or partially unloaded; many arrangements can be made on a shipment. You are trying to propound the idea it has to go through with the seal to New York; he isn't stating that.

The Court: Yes.

Q. Mr. Ziegler, when a shipment of 16,000 pounds is made and it is a 24,000 carload price being charged, that car is supposed to remain sealed and locked for all purposes until it reaches the destination in New York City? A. That is right.

Q. And as far as you know that is the way it went through, isn't it?

A. I have no knowledge.

Q. Well, there was no complaint to your company? A. Not as to which?

Q. Well, as to the amount that was in it?

A. No.

Mr. Leibowitz: That is all.

(Testimony of Robert Ziegler.)

Mr. Lamb: That is all. . .

Mr. Lamb: Those are permanent records of the railroad company.

Mr. Leibowitz: I have no objection to taking them [322] out. I don't think it is much so far as I am concerned and we have got the stuff we have questioned in on record.

Mr. Angland: This case is going to require a record; shouldn't the record be complete, your Honor?

The Court: It is a record of the evidence here; it should remain here. To accommodate you might stipulate.

Mr. Eickemeyer: Copies could be substituted.

The Court: Let copies be substituted and then the original documents may go back.

Mr. Lamb: Then will defense counsel stipulate that upon the conclusion of this particular trial that Mr. Ziegler may have the original records for the purpose of making a substitution thereof, making photostats thereof and then substituting the photostats for the original documents which are now in court.

Mr. Leibowitz: Very good. Very well.

Mr. Lamb: You are so stipulating?

Mr. Leibowitz: Yes.

The Court: Very well.

Mr. Leibowitz: Let the record show we reached that arrangement.

Mr. Lamb: At this time the Government rests. [323]

Mr. Emigh: May it please your Honor, at this time the defendant first——

The Court: Do you want to make a statement?

Mr. Emigh: No, your Honor, I wish to make a motion; before that, I would ask the Government to indicate the portion of Plaintiff's Exhibit 1 which is being offered in evidence in this case. It is a very large document, involves a great many things, and as I understand it there are just a few pages they rely upon.

Mr. Lamb: We rely upon the whole manual.

Mr. Emigh: We would like the Court to make some order limiting this exhibit to the portions that counsel deems of moment to the Government's case in order that the Court may not be unduly burdened with this voluminous stuff and a burden put upon the Court trying to find out what particular matter pertains to this case.

The Court: I don't know that there is any necessity of this particular exhibit—what exhibit is it, Exhibit 1?

Mr. Emigh: This is Exhibit 1 and has some very important matter in it, but as I understand it the Government already read from six pages, and there might be other important regulations in connection with what they read from and it is in evidence and we have no objection to its staying, but, as I say, there are several hundred pages that have nothing to do [324] with this case.

Mr. Lamb: Your Honor, in this particular case Exhibit 1 is the United States Air Force Operating Manual. The original sheets and the testimony thereon does give some information, or would give information to the Court as to the authenticity of the information contained therein, and the whole exhibit has been offered in evidence and as far as any record or any future action of the Court or any other court the original instrument itself could go as an original exhibit, and I prefer at this time not to pull the exhibit apart and that it remains in the files as it was admitted in evidence.

Mr. Emigh: We will ask then that counsel be required to designate, if this manual is to remain in the record, designate the portion thereof they deem applicable to this case for the convenience of this Court and possible reviewing court and counsel and everybody involved. There's hundreds of pages here I am quite sure from counsel's statement today and cursory examination it can do nothing but encumber the record. We have no objection to this remaining in this form if——

The Court: It does not encumber the record so much, Mr. Emigh. If it is admitted and received in that form, it doesn't have to be copied by anybody or anything of that sort, but if it is introduced in that form and this case is some other place sometime you might want to see that manual and [325] look it through and see what you find in it. We don't know what or how much may be made of it or what will come out of it or what the future of this

case will be. You might want to use that manual itself. It was introduced in its entirety, any part of it later on and we don't know what question might arise you would want to look up.

Mr. Emigh: Well, I can't imagine the jury reading seven or eight hundred pages to find out what this case is about.

The Court: Well, the jury don't have to read seven or eight hundred pages; if they want to look at it, they can. If someone in the jury room questions the manual, they can look it up in the manual and look in the index.

Mr. Leibowitz: Of course, the point is we don't know what the Government is relying on for its case, and they put the burden on us to go through this record to find out. There may be something important and I don't think we ought to have this obligation.

The Court: Of course, if this case goes elsewhere sometime, we will have a transcript and by reading that transcript you can find out what the Government relied upon in the manual.

Mr. Leibowitz: We should have known before we even went to trial what they were relying upon; that is why we have an indictment. [326]

The Court: Well, you have a transcript to rely upon which is sufficient.

Mr. Leibowitz: We will take an exception.

The Court: I will let the record stand as it is.

Mr. Emigh: Your Honor, the motion which I anticipated is in written form and we will file it in that form and ask to present our argument on it.

The Court: Well, you can do that in the absence of the jury.

The Court: So we have a motion, ladies and gentlemen of the jury, involving some law questions and it may relate to the facts and you should be outside when they are arguing this matter. So you may retire and the Marshal will find a convenient place for you and call you back when we are ready to go on.

The Court: We will take a recess for fifteen minutes. (11:10 a.m.)

(Court resumed, pursuant to recess, at 11:30 a.m., at which time the defendant and all counsel were present. The jury was not present.)

The Court: Mr. Emigh, I will hear your argument.

Mr. Lamb: Your Honor, do you want to excuse the jury at this time?

The Court: Oh, yes, we might as well excuse the jury until two o'clock. Bring them in, though.

(The jury was present.)

The Court: Ladies and Gentlemen of the jury, we haven't entered upon our argument here yet, so I am going to excuse you at this time until two o'clock this afternoon, and you remember the admonition of the Court, don't talk to anyone or let anybody talk with you about the case or discuss it among yourselves or form or express any opinion as

to the guilt or innocence of the defendant until the case is finally submitted to you. Don't let anybody talk to you and if anybody speaks to you, remind them you are a juror, and if they insist upon it, report it to the Marshal of the court. You are excused until two o'clock this afternoon.

(The jury retired from the court room.)

The Court: Well, gentlemen, I will give you twenty minutes on the side for argument of this motion if you need that much time.

Mr. Emigh: May I be permitted to address the Court from a little closer position?

The Court: Did you hear what I said just now?

Mr. Emigh: Sir?

The Court: Did you hear what I said just now?

Mr. Emigh: No, I didn't.

The Court: Well, I said I will give you twenty minutes on a side if you need that much time.

Mr. Emigh: Well, I think I can present this, or we can. [328]

The Court: You will have to be brief about it because I have looked into it carefully, anticipating you would make this motion, so I think twenty minutes on the side would be sufficient.

Mr. Emigh: Yes, I agree with the Court on that. I just wanted to explain to the Court that while the Court may not hear me I cannot hear without my amplifier, and if I speak with my amplifier on, I drown out my own voice.

The Court: Well, there are times when you amplify considerably.

Mr. Emigh: May it please the Court, at this time the defendant has made a written motion, which the Court has, for a judgment of acquittal. And this motion first is based on the grounds that there is not sufficient evidence to warrant the conviction of the defendant or to establish a *prima facie* case in behalf of plaintiff. In this regard, you Honor, the indictment charges in both counts similarly; in one as to the promising or offering of a bribe, and the other as to the giving of a bribe. That the act was committed, first, with the intent to influence the decision and action of Harvey B. Apperson in his official capacity and function in a certain matter then pending before him in his official capacity, as the defendant well knew.

Now we submit that the record discloses, plaintiff's case discloses that there was no matter pending before [329] the officer in his official capacity in relation to which the evidence applies. Had this offer, alleged offer, been made and the bribe passed in some relation in connection with this bid that had been made herein, the officer, whether acting as an officer or a person, was acting in his official capacity, the matter would have come squarely under the statute and squarely under the presumed intents of the indictment. That is, possible presumptions. We still maintain that the indictment is insufficient, of course. In that respect there was a matter pending in his official capacity. He had authority to receive these bids. He had authority to determine the sufficiency of the bids, and if that

money had been offered and passed for the purpose to induce him to receive a lesser bid than the one made, then I say it would come squarely under the statute.

But here the evidence discloses the situation that there was no matter pending before that officer until that officer made a situation by handing out to the defendant the exhibit containing certain salvage articles, not scrap, salvage articles, and indicating certain things there. Now there was no matter pending in his official capacity after that for the reason that the evidence discloses that he as an official discharging his functions and acting in an official capacity, and this is the Government's evidence, having absolutely no authority to proceed with a sale or giving away [330] or larceny of that surplus material in the manner that he proceeded in order to create the commission of a crime, and in order to encourage the commission of a crime, and in order that an apparent crime would be perpetrated. So, in his inception there was no matter pending before him in his official capacity as to this transaction in relation to the goods in warehouse 1045. So he proceeds with the aid of other Government officers, may it please the Court, to create a matter, but that matter was not pending before him in his official capacity. That matter was extra-official. The testimony shows he had no authority to consummate that matter. The evidence shows that not only did he have no authority to dispose of that matter without bids but he had no power to

proceed and deliver that property. He created not a matter pending before him in his official capacity but he created a false situation and proceeded under a false situation and induced a bribe, may it please the Court, under a false situation which as a matter of law he had no authority to consummate and he couldn't influence him in his official capacity.

The purpose of this Act, as I understand it, and it appears in a great many cases, is to prevent the corruption of officers in the performance of their official duties. Now, as I have stated, there wasn't a matter pending before him. It wasn't a matter he could consummate. The evidence shows they couldn't have sent those trucks in to take that [331] material out without getting permission from headquarters to proceed with this entrapment, may it please the Court. And in that we think that the evidence fairly shows that it is not a situation coming within the conception of the statute.

Now if he could have done anything there at all, if he could have gotten away with that bribery, if they had moved that railroad car out at night in violation of orders of the Post, it would have consummated nothing more than larceny or an embezzlement by a bailee. It wouldn't constitute a violation in respect to the Act, without they were in respect to an official capacity, but it would be just a good old garden variety of larceny as a bailee, and the defendant would not be appearing as one charged with offering a bribe to influence an officer, but had this transaction been consummated the offi-

cer and he would have been indictable, the officer as a principal and he as an aider and abettor and accomplice. But the truth of the fact is there never was any intention to do anything at all in his official capacity but to entrap this man. And I think it is a far cry to say that one of the official capacities of an officer of the United States is to entrap, to encourage the commission or apparent commission, may it please the Court, of a crime and entrap a person in commission thereof.

Further, I think the evidence is insufficient here as to the identification of the officer. They allege the power is within the Government to apprise this defendant of his [332] official capacity. He is charged with being, to use the correct language here, a First Lieutenant, United States Air Force, and Base Salvage Officer of the Great Falls United States Air Force Base, and the evidence discloses that he is, and there is an exhibit here if I can find it—I don't remember the exact wording, but it certainly does not define him or give him authority as a Base Salvage Officer. The Court in overruling our objections to the secondary evidence which was proposed to establish that he was the Base Salvage Officer of the Great Falls United States Air Force Base required that the Government let that evidence in subject to connecting that evidence up by the Government. The Government proceeded to connect that evidence up, but in doing so showed him to be another officer with another title, and we think there is a fatal variance in that respect be-

tween the proof and the allegations of the indictment.

We think that as to the facts proven here there is strong evidence of entrapment. Whether the Court determines that an entrapment was established as a matter of law or whether it is a matter for the jury, the Court will determine upon this motion; if it is a matter for the jury this motion will be well taken; if it is a matter of law, there is sufficient evidence in the mind of the Court to establish that as entrapment, then it is the power of the Court to act on this motion; I recognize that. [333]

Proceeding then with a separate—yes, your Honor, this is a statutory crime and the statute and the allegations of the indictment must be strictly construed.

The second matter is in relation to count two and in that respect the evidence, of course, is the same as it is to the count one. And, of course, in this motion, your Honor, the sufficiency of the indictment is before the Court. We did not waive that at any time and I am not going to weary the Court with argument. I think the Court has heard our arguments on that. The one thing, though, that the Court couldn't appreciate when those arguments were made was the impossibility of a defendant from those allegations to anticipate and prepare to defend the proof brought here to establish both of those allegations. And we respectfully submit to the Court that as the evidence stands in the course of the Government's case the evidence does not es-

tablish any crime which is denounced under the statute and the indictment is not sufficient to establish any crime.

Counsel has been kind enough to find me the exhibit containing the designation, and this is the legal authority; this is not somebody's conclusion or this is not secondary evidence; this is the best evidence, may it please the Court, and is controlling over the secondary evidence as to the appointment of the officer, Harvey D. Apperson, and it is found in paragraph 12 of Plaintiff's Exhibit No. 7, [334] which is as follows—now this is an order issued by Colonel Chennault, and this is the evidence they offer, paragraph 12:

“1st Lt. Harvey B. Apperson, Jr.—with his serial numbers—Headquarters and Headquarters Squadron, 517 Supply and Maintenance Group. This states, I presume—with primary duties as Group Adjutant is reld for assignment—these are abbreviations, your Honor; I am not quite familiar with them. I think that is—released for assignment—thereto and primarily therewith and assigned to 517 Supply Group, Supply Squadron, 517 Supply and Maintenance Group—this states as with primarily as Salvage Property and Disposal Officer. And with additional duties as Squadron Commander, I believe that means. 517th Supply Squadron, no travel involved, authority VOGG, CNTL, MAT, CNR, 4 August 1948.”

And we submit that does not meet the indictment. My associates may add to this motion, but we submit, your Honor, that there is insufficient indictment and insufficiency in the evidence.

Mr. Eickemeyer: Your Honor——

The Court: Well, if you want to speak a few minutes; I don't know what you can say that co-counsel hasn't already stated.

Mr. Eickemeyer: The only thing I would have to say [335] would be just a few words, your Honor, and that is this. That this officer Apperson, his capacity in the office is created by the commanding officer, and that is Chennault; he is the one that has the power of appointment, and he appointed him to the office of salvage and property disposal officer, which is not the officer that he is alleged to be in the indictment.

The Court: Proceed.

Mr. Lamb: If the Court please, I think I can wind up a little more briefly than the time limit that the Court has granted us. Of course, as counsel for the defendant has stated, most of his argument is presented toward the failure on behalf of the Government to present a *prima facie* case, and some argument was given that there was no matter pending before Lieutenant Apperson upon which this evidence introduced at this time applied. The manual, being Plaintiff's Exhibit No. 1, and the testimony given by Lieutenant Apperson, the testimony given by Sergeant Aulgur shows that the duties of Lieutenant Apperson covered the storage and han-

dling and the disposal of all usable surplus property at the Great Falls Airbase, and the matter of the proper disposal, storage and handling of usable surplus property was pending before him on the 22nd day of November and on the 23rd day of November, and for some considerable period thereafter, so there was a matter pending before Lieutenant Apperson toward which this [336] evidence directly applies.

There was some testimony, or some argument that when on the 23rd day of November the inventory of those usable items was shown to the defendant, Meyer Schneider, that there was no matter pending before Lieutenant Apperson. Of course, my previous statement that there was a matter because the very regulations which are here before the court and have been admitted in evidence, and the testimony of Lieutenant Apperson, clearly disclose his duty as salvage officer to properly store, handle, dispose of, and to make reports concerning the handling and disposal of any property that came into his hands from the Base Quartermaster Officer, and the evidence here pertained to the proposal of the defendant that that property be improperly handled and disposed of, and improper reports be made by the defendant.

The statement was made by counsel that Apperson had created a matter that was not pending before him in his official capacity and that the indictment did not cover that particular situation. On lines 26 through 32 on the first count it reads: "For the purpose and with the intent to influence the

said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well [337] knew, in respect to the disposal of salvage property of the United States, as aforesaid."

So we have a matter which the defendant was attempting to induce Lieutenant Apperson to take some action on and the matter was pending before him at the time of the attempt on behalf of the defendant to induce him to take some particular action. First, to permit or to allow and make an opportunity for the commission of a fraud upon the United States. That allegation is proven by the evidence that the offer was made by the defendant with the attempt to secure the cooperation of Lieutenant Apperson to permit him to remove property from the Airbase without paying for it, which would result in a fraud upon the United States, and would result in Lieutenant Apperson doing an act in violation of his lawful duty as defined by the regulations which are here before the court.

Now, of course, it is true if the transaction was consummated as attempted by the defendant that both the officer and the defendant would have been guilty because it would have been a fraud and it would have been necessary in the, in accordance with the testimony of Lieutenant Apperson on the reports he was required to make in order to cover it

up to avoid any prosecution on his own part; he would have had to alter the records or make some false reports which, of course, would have been an active violation of his duty. [338] In addition there is a specific provision in there requires him to supervise and to prevent any situations that might make opportunity for fraud upon the United States.

Now as far as the base salvage officer is concerned the orders are before the court appointing Lieutenant Apperson as salvage officer. The Adjutant General of the Great Falls Airbase testified here that there was only one salvage officer on the United States Great Falls Airbase, and the evidence is clear that he was the base salvage officer. Lieutenant Apperson testified that he was there in command and in charge of the base salvage office as shown by all of the corroborative witnesses who were here, Sergeant Aulgur, Private Walker, and everyone else who testified that Lieutenant Apperson was in charge as base salvage officer and in charge of the disposal and handling of all of the salvage property upon the Great Falls Airbase.

As far as the entrapment is concerned I believe in our judgment that the evidence is clear and distinct that Lieutenant Apperson did not induce, he did not entice, he did not persuade, he did not lure, and he did not entrap the defendant either on the 22nd day of November when he first came to the Airbase or again on the 23rd day; all affirmative action in this whole transaction was taken by the defendant himself; he created the situation and

Lieutenant Apperson merely acceded to his wishes and let him do anything he cared [339] to. The evidence is unrefuted that the removal of the property from warehouse number 1045 was done by employees of the defendant; and that they at his direction removed that property from building 1045 and put it on his freight car; and without any question that every affirmative action that was taken in the whole case was taken by the defendant himself in attempting to secure property belonging to the United States to commit a fraud upon the United States, and in an attempt to get Lieutenant Apperson to violate his lawful duties with respect to the proper handling, disposal and storage of surplus property of the Government. That is all.

Mr. Leibowitz: Now, Mr. Lamb says that a matter had been pending before him in the storage and in connection with the disposal of the merchandise. There was no way that Lieutenant Apperson could possibly dispose of that merchandise or handle it in a fashion such as has been involved here unless he had absolute raw authority without any limitation or without any accountability towards anybody. That stuff was reposing in a warehouse and it must repose there until a decision had been made by some authority to decide to sell it to the people, and the only way it could be sold is according to the rules and regulations written by bidding. Mr. Lieutenant Apperson had testified that as far as the transportation of that stuff he had no authority to transport it outside of that Base; the only place he can trans-

port it is from one warehouse [340] to another, but he certainly had no authority to take that merchandise and put it on a railroad car and send it off. He said he couldn't even make only spot sales unless he got certain permission from somebody. Mr. Lieutenant Apperson testified he couldn't do anything with the merchandise until it was actually paid for and there is no proof here there was even an attempt to pay for it. As a matter of fact, Lieutenant Apperson didn't want the man to pay for it. It might have been a different situation if he had gone into the office and paid and under paid on what it was worth. If Lieutenant Apperson had the authority, then I might say he committed a fraud on the Government because he had gotten something for which he didn't pay, but here is a case where the man had no right to start moving it unless it was done in accordance with certain specific rules and regulations, and, of course, there was no rule or regulation complied with or attempted to comply with. The very fact they had gone into General Chennault indicated they were fearful many of those things couldn't be done unless they had authority to do it, and even then General Chennault could not give them that authority; even he didn't have that power to violate these rules and regulations. It was really done for the purpose of entrapping this defendant into the commission of this crime. And I say there isn't anything in this record here which would support the conviction of the defendant, and I think [341] that the court should dismiss the indictment.

Mr. Eickemeyer: If the court please, I don't want to take much time, but I believe this is a serious point which has developed as the evidence has gone in here how serious a question the allegations of this indictment are. Now, it must be conceded that Colonel Chennault, according to the rules and regulations, is the officer who appoints Apperson. Now, under his authority he would appoint him and he appointed him to the office of salvage and property disposal officer. Now, if the court please, it is apparent to the court immediately what we are confronted with in this indictment. This indictment charges that he is a First Lieutenant of the Airbase and base salvage office, an entirely different designation. Now it may be that we are hit with this proposition in the indictment "and person." The argument we used in our motion to dismiss the indictment whether his act promised money to a certain officer, and that is designated as base salvage officer, and then the proposition comes "and person acting for and on behalf of the United States." And that is a situation we were up against to meet this, their proof, and that was the situation we were up against when, in analyzing the indictment to see what we had to meet, and now it develops that Apperson comes in here under the authority of an appointment to a different office entirely and they can't come in here now by evidence and try [342] to say his duties and functions are the same because they named him and they should know and it is specifically pleaded here that he is base salvage officer.

The Court: Well, gentlemen, I will take the matter under advisement. Court will stand in recess until two o'clock this afternoon. (12:10 p.m.) [343]

(Court resumed, pursuant to recess, at 2:00 o'clock, p.m., on December 15, 1949, at which time the defendant and all counsel were present. The jury was not present.)

The Court: Well, gentlemen, I have considered your motion you made here for judgment of acquittal. I have tried to give it fair consideration since your argument, and anticipating, of course, that you would make such a motion I have looked into the matter beforehand and I am satisfied that I would not be justified or warranted in any way in view of the evidence that has been presented in this case of granting your motion; therefore, the motion will be overruled.

Mr. Eickemeyer: May we have an exception, your Honor?

The Court: Bring in the jury.

Mr. Emigh: May I make a statement?

The Court: What is it about?

Mr. Emigh: So as not to delay the case there are two other motions; one will be a motion at the close of our case. We would rest and renew the motion that was made and should call it to the court's attention in justice to the court. Your Honor, this motion will be over in just a few minutes; it is nearly all written out.

The Court: All right, read it. You are making this as part of the motion?

Mr. Emigh: The old motion is incorporated in this [344] but the point in the new motion is, your Honor, a matter on which the authorities are rather uniform on it to be a serious matter here and that is this. It is a matter that runs to the very merits of the case and that is the only proof or authority which is contained in this exhibit relates to a First Lieutenant Harvey D. Apperson, Junior.

The Court: Now I have considered that very carefully.

Mr. Emigh: I don't think this point has been brought to your attention.

The Court: As to the point of identity of the person or officer?

Mr. Emigh: No, that is not the point. The point is they name one man in the order and another man in the indictment; to wit, names a Harvey B. Apperson. The order names Harvey D. Apperson, Jr., and we think under the rules that if that Jr. was surplusage nevertheless it is bound to be—the omission of that, or initial surplus, must be proved as alleged. That is an important point.

The Court: He is by several witnesses identified as the officer, salvage officer at that Post, and his name is given as Harvey B., and the officer who had control and custody of that document says that this is the Harvey B. Apperson at the Great Falls Airbase.

Mr. Emigh: The court gets the difference in the initial? [345]

The Court: I don't think that makes any difference. He has been positively identified by a dozen witnesses as to who he is.

Mr. Emigh: Your Honor, this motion is not before the court; may I complete the motion? The next motion is, your Honor, we are going to ask the court to withdraw count one. We have the written motion to withdraw count one as constituting a part of the transaction in count two. That is, if there is anything at all it is just one transaction.

The Court: Oh, no, that is overruled.

Mr. Emigh: I haven't made the motion.

The Court: I don't want to hear any argument on it.

Mr. Emigh: We want the opportunity to present this in form.

The Court: All right, read it off. This has been all gone over and considered before, all except this identity of the officer at the Base.

Mr. Emigh: We have that motion in form and I will just get it in the record, your Honor.

The Court: Tell me, what is this motion? What is it composed of, this new motion you are bringing up?

Mr. Emigh: That is the one I spoke to you about and I mentioned the one included at the end of the Government's case. [346]

The Court: You got another one?

Mr. Emigh: That is right. That is the one I

told you about and, that is, everything has now been discussed.

The Court: All right, the motion is overrule and denied and may go into the record. Now, there is another matter I am going to bring up with you gentlemen, you offered some instructions here and some of them I will give and some I don't intend to. And I want to call your attention to the instruction on entrapment. I am satisfied I am not justified or warranted in giving an instruction on entrapment in view of the testimony of Lieutenant Apperson and the surrounding circumstances and corroborating evidence that stands undisputed in this case. Now I have examined a good many authorities and I am satisfied there is no entrapment here; so that will go out of the case.

Mr. Emigh: This is the motion the court already overruled, I take it?

The Court: Yes, I have overruled it; if it is the motion you just stated.

Mr. Emigh: It is the motion for judgment of acquittal.

The Court: The motion for judgment of acquittal you argued before recess.

Mr. Emigh: With the exception of the changes I have told the court about.

The Court: You just told me about? [347]

Mr. Emigh: New matter.

The Court: You had a new motion here?

Mr. Emigh: Yes. And let the record show before this motion is presented that the defendant rests.

The Court: Before the motion?

Mr. Emigh: This is a renewal of the motion at the close of the defendant's case.

The Court: The defendant rests and then you are making this motion?

Mr. Emigh: Well now the motion appears subsequent to the resting of the defendant.

Mr. Leibowitz: Now referring to the refusal to charge the instruction of entrapment may we have an exception to that?

The Court: Certainly.

Mr. Emigh: And an exception to this ruling and as to the motion for judgment of acquittal.

The Court: Yes.

Mr. Emigh: Now, your Honor, I wish to present the other motion I spoke of, the withdrawal of count one from consideration.

The Court: That is overruled.

Mr. Emigh: That is overruled and we ask an exception on that.

The Court: Call in the jury. [348]

Mr. Eickemeyer: Have you copies of them?

Mr. Lamb: You use the word "copies"; I haven't any.

Mr. Emigh: Just as soon as I make the changes.

(Whereupon, the jury returned to the court room.)

The Court: Ladies and gentlemen of the jury, the defendant has rested his case and the arguments of counsel are now in order. Gentlemen, how much time do you all want to argue, all three of you? All three counsel want to argue?

Mr. Leibowitz: No, it has been arranged between the two of them, they are going to argue.

The Court: Well how much time do you think you should have? Can you hear me, Mr. Emigh?

Mr. Emigh: Yes. I was just contemplating the time. I don't think the defendant's case will take more than half an hour, three-quarters of an hour; half an hour will be sufficient.

Mr. Angland: For each of you or together?

Mr. Emigh: Half an hour for the defendant.

Mr. Angland: That is cutting it a little short, your Honor.

The Court: Gentlemen, I have had quite a little bit of experience with counsel and I know how they get strung out in an argument and get going and sometimes it is hard to reach terminal facilities. Don't you think I had better give you at least an hour? I will give you an hour, or [349] I will give you more if you want it. This is an important case and there are a good many things brought out here you may want to discuss. Well, I will give you an hour. I will allow an hour on the side; you can take as much of that time as you need.

Mr. Leibowitz: I might suggest we waive our summation if the plaintiff waive their summation and let the case go in.

The Court: How is that?

Mr. Leibowitz: We are perfectly willing to waive summation if the Government waive their summation and let the case go in as is.

Mr. Lamb: We are perfectly willing to do that

and very pleased to do so and the court may therefore on the reliance on the statement of counsel may charge the jury.

The Court: I didn't quite understand.

Mr. Eickemeyer: We are waiving the argument. The Government is waiving the argument and we are waiving the argument and we will submit the case.

The Court: Without argument?

Mr. Eickemeyer: Without argument.

The Court: On both sides?

Mr. Lamb: That is correct, your Honor.

The Court: Very well, then all that remains to be done as the record may be shown on that is for the court to give its instructions to the Jury. [350]

The Court: Well, ladies and gentlemen, that will enable us to save considerable time and probably enable you to get this case for consideration before dark so that you won't be kept up all night or a part of the night and counsel with you. So in that respect I will proceed.

Mr. Angland: The witnesses may come into the court room now and hear the charge to the jury?

The Court: Yes, they may come in, if they want to come.

The Court: Ladies and gentlemen, as you know, when you have served on juries before, at the conclusion of the evidence in the case and after the arguments of counsel the court delivers its instructions to the jury. Now in this case it is a little different. The court delivers its instructions after

the submission of the evidence and certain motions, which have been presented to the court during your absence from the court room, so that the instructions come in this particular case after the evidence and motions inasmuch as counsel on both sides have waived their arguments.

Now, the instructions, we speak of them as instructions, sometimes they are called the charge to the jury. They are really rules of law that the court deems applicable to a case of this kind. Now you are the sole judges of the facts of the case. You judge the credibility of witnesses, you judge the weight to be given testimony and the weight to be [351] given circumstances, and the court gives you the rules of law that he deems applicable.

Now you will remember during this lengthy voir dire examination by counsel for the defense there were several different propositions of law presented to you. Now if your recollection of the law as given you by counsel when you were thus being examined should vary or differ with the law that is given you by the court, at this time, of course, you will accept the law as given you by the court.

And now I observe another thing and I think it should be balanced and that is the question was also propounded to you on your voir dire examination every one of you, I think, with the exception of two or three cases whether or not you would give the defendant a square deal. Well, of course, you all answered that you would. Now, of course, you would mean also that you would give the Government a

square deal. It is up to you ladies and gentlemen to give both sides a square deal and that means that you will render a verdict according to the evidence you have heard here in this court room and taken in connection with the instructions of the court.

Now this is a case of a felony charge here. It is under 201. Well, in the first place, we will consider the information; simply the document itself. Now this is no evidence at all in this case and shouldn't be considered by you as such. This is merely the formal charge, a form that [352] was handed down by the grand jury and it is for the purpose of acquainting you and the defendant with the nature of the charge and all who are interested here in this trial so that we know what it is about; it is not to be considered as any evidence whatever. Now I am going to read you this because if arguments had been made here some of the counsel would have read the charge to you. This is Count One, Offer of Bribe, under Title 18, 201, United States Code Annotated.

“That on or about the 22nd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the

intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation [353] of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid."

Now that is the first count. Second count. Count number two is bribery. You noted the first one was the offer of a bribe; both separate and distinct offenses. Bribery, Title 18, Section 201:

"That on or about the 23rd day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously did give a sum of money to wit: One Thousand Five Hundred (\$1500.00) Dollars, to a certain officer and person acting for and on behalf of the United States in an official function, to wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official

capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect [354] to the disposal of salvage property of the United States, as aforesaid.”

Now, then, under these two charges you can find the defendant not guilty of one or both of these counts, or you can find him guilty on one or both of the counts, depending upon how you resolve the evidence. Now I will read the statutory provisions here upon which that indictment is drawn so you will have it in mind. This is Section 201 upon which both counts of the indictment are based:

“201. Offer to officer or other person. Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of

Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, [355] any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

Now that, ladies and gentlemen, is the law from which this prosecution is based, and this indictment was directed and handed down by the grand jury.

Now there was another matter to be brought to your attention in connection with this indictment. To this indictment the defendant was arraigned and entered his plea of not guilty. Now under that plea and at the beginning of the trial and all through to the end there arises in law what we call the presumption of innocence, and that means that the defendant is presumed to be innocent of this charge until he is proven guilty beyond a reasonable doubt as that will be defined to you by the court.

Now, ladies and gentlemen, you were selected here on void dire examination after a very searching examination in which everything that seems to

the court might have been of any material interest was gone into to see whether you had any bias or prejudice against this defendant, and you all indicated that you had not, and on a brief examination by the United States Attorney you also indicated that you had no [356] bias or prejudice against the Government, and that you would deal justly and fairly in the consideration of the evidence. You knew nothing about the facts in the case. Some of you have read a year ago or perhaps recently some newspaper story about this case but it was evident from your reply that it left no impression upon your minds whatever and that you came here with free and open minds without any opinion whatever as to the guilt or innocence of the defendant. Now that is a proper state of mind for a juror to be in when they hear the evidence. You hear the evidence in the case and you retire to your jury room and there you discuss it and examine it from every standpoint; what one juror doesn't think of the other will, and in that way you endeavor to the best of your ability to resolve the evidence and decide what you ought to do in the case.

Now you will remember during the questions during your examination that counsel kept inquiring of you whether in regard to the defense of entrapment that is sometimes put up in cases and that was repeated to you time and time again so that the court feels that it is its duty at this time to advise you that there is no defense of entrapment in this case, so that you will forget what was said by

counsel in his examination of you on your voir dire examination, anything in respect to the question of entrapment as a defense here.

Now then as I said before this presumption [357] of innocence follows the defendant; he is clothed with it throughout the trial of the case, and it goes to the jury room for your deliberation and consideration and you are then and there to determine whether notwithstanding the presumption of innocence you believe the defendant has been proven guilty beyond a reasonable doubt. Now having heard and read and reasoned it out, and there have been a great many definitions given, some of them very long; I can remember when I was a young man hearing long-winded instructions given by Judges all on construing reasonable doubt, and after the Judge had gone through it and reading it to the jury I don't suppose the jury could tell what it was all about because I didn't think at that time and I don't think now it was a very fair definition. As a matter of fact, a reasonable doubt is a very simple proposition. The words themselves practically define it. A reasonable doubt, a doubt for which you can find a reason, a good substantial reason based upon the evidence or the lack of evidence or the character of the evidence, as the case might be.

Now, ladies and gentlemen, after you have considered all of the evidence in this case, that which is favorable as well as that which is unfavorable, if you feel that you have an abiding conviction to a moral certainty of the truth of the charge, then

it would be your duty to convict the defendant; but on the other hand after so considering all of the [358] evidence in the case you feel that you have not an abiding conviction to a moral certainty of the truth of the charge, then it would equally be your duty to acquit the defendant. Now you understand that definition, the force and effect of those words, an abiding conviction to a moral certainty. Let's use some other words in that definition, an abiding and a continuing conviction, belief to a moral certainty to a very high degree of probability, and some courts have even gone a little bit beyond that, to a very high degree of probability; so there you have a definition meaning the same as those legal phrases defined. Now, of course, it would be impossible for the Government counsel here to have proven this case beyond any mathematical, to a mathematical certainty, or such certainty required in the sciences, and it is not required, but to be proven beyond a reasonable doubt as the court has defined it to you.

Now then I said a few moments ago you were the sole judges of the facts and the weight to be given circumstances and evidence presented here in the case, and also the credibility of witnesses. You have an opportunity to see the witness as he takes the stand and he is sworn to tell the truth and nothing but the truth; you note his demeanor on the witness stand; you note his manner of testifying, and you note whether he is frank and candid and outspoken and apparently endeavoring to

tell you the truth and all of it, [359] or whether he has a poor memory or speaks in monosyllables or seems to be evasive in avoiding the question of whether he notes some bias or prejudice against somebody in the case, either the defendant or the Government, or whatever it might be. If you note such bias or prejudice on the part of a witness while giving his testimony, you take it into account and discuss it when you go to your jury room and see what weight you will give it.

Now the only office of a witness here in the court room is to tell you the truth, the whole truth and nothing but the truth, and the presumption is that the witness is speaking the truth, but that presumption may be repelled by his manner of testifying, by the character of his testimony or by contradictory evidence, and as to such matters you are the sole judges. If you believe that some witness has deliberately and intentionally testified falsely to some material matter here, you have a right to distrust his testimony. You might after discussing it and considering it decide that you will discard it altogether, or on the other hand, you may say well this is corroborative here and some other witnesses and here are some other circumstances that should be considered as corroborating at least a part of this statement so that then you might say, well, it is partly corroborated, we will accept it in part and reject it in part. But I merely state that to illustrate it all depends upon your judgment for you are the sole judges as to what you will do with the testimony.

Now in a case of this kind the court will instruct you you note sometimes where there are a good many witnesses on one side and none on the other or very few on the other the court gives the instructions that it does not depend, to decide evidence does not depend upon the number of witnesses testifying to a fact or state of facts, one witness, one credible witness, that means a witness in whom you have confidence, a witness whom you believe, is sufficient to prove a given fact or state of facts in this case, so you remember that as an instruction. I might refer to it later on because I have a few written instructions I am going to bring to your notice before I get through.

Now, of course, intent, the intent is always an element, necessary ingredient to be established in a case of this kind. This is a felony case and the jury before they can convict the defendant must find here in this case beyond a reasonable doubt a joint operation of act and intent, or what we call in law criminal negligence. Now criminal negligence in that connection means the doing of an act with a reckless disregard of the consequences, not caring particularly what happened. Now you are unable, of course, any of you to look into the mind of the defendant and determine with what intent he acted if you believe that he acted in accordance with the charge contained in this indictment. But in order to determine that intent you must take into account all of the evidence in the case and all of the circumstances that you have observed during the progress of the trial in con-

nection with the case and the facts of the case and sometimes circumstances are very important and afford very important evidence, and that is for you to say because you judge of the facts and the circumstances the same as you do the testimony of the witness from the witness stand. But you remember in that connection you are to recall the presumption that every sane person is presumed to intend the natural and usual consequences of his own deliberate act. However, the court instructs that as heretofore that you must be satisfied beyond a reasonable doubt of his guilt before you can find him guilty; that is, you must be satisfied beyond a reasonable doubt that he acted, that if he acted at all with a criminal, that is to say, with an evil intent to violate the law.

Now the counsel for the defendant have handed up to the court some special instructions on the case that they requested the court to give, and here is one of them, Instruction No. 1.

You are instructed that a presumption is a deduction which the law expressly directs to be made from particular facts, such is the presumption of innocence in this case which arises from the facts that the Government has charged the defendant with the commission of the offenses alleged in the indictment, and the defendant has pleaded not guilty thereto. Such a presumption may be controverted or overcome by other evidence, but unless so controverted or overcome, the jury are bound to find in accordance with the presumption.

Instruction No. 2 from the defendant. This is on the presumption of innocence which I have already talked to you about.

You are instructed that in every prosecution for a crime or public offense the defendant is presumed to be innocent. You are further instructed that such presumption is not an idle presumption but has the force and effect of evidence and abides with the defendant throughout the trial of the case and during your deliberation and entitles the defendant to an acquittal unless and until after due deliberation you find unanimously that such presumption has been overcome by the Government's evidence and that the Government has established the guilt of the defendant beyond a reasonable doubt.

I am not giving the other instructions.

Now then we come to another very important feature of this case we will continue to consider and that is the fact that the defendant has not taken the stand and testified. The law on that is found in 3481, Title 18 of the United States Codes Annotated. And here is the language of the statute:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

So that would indicate that this is no part of

your deliberations or discussions because the law clothes him with that presumption which we must recognize.

Here are two old stock instructions but notwithstanding what I have already said and I have already covered it in part I am going to read them to you because they are impressive and they are still good.

You are the sole judges of the credibility of all witnesses who have testified in this case and the weight to be given their testimony. A witness is presumed to speak the truth but this presumption may be repelled by the manner in which he testifies, by the nature of his testimony, or by evidence affecting his character for truth, honesty and integrity, or his conduct, or by contradictory evidence. In determining the weight to be given testimony of any witness you have the right to consider the appearance of such witness on the stand, his manner of testifying, his apparent candor or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, his knowledge and means of knowledge of the subject upon which he testifies, together with all the other circumstances appearing in evidence on the trial. And under our law the direct evidence of any witness entitled to full credit is sufficient proof of any fact except in proof of treason, and I have already instructed you that that rule applies in this case.

Now here is another one. You are instructed your

power of judging the effect of the evidence is not arbitrary but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declaration any known facts which do not produce conviction in your minds against less knowledge or against other evidence satisfying your minds.

You are further instructed a witness false in one part of his testimony is to be distrusted in the others. You consider that in connection with the instructions I have already given you on that subject.

You are further instructed that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which is within the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered with the appearance that stronger and more satisfactory evidence is within the power of the party, the evidence offered should be viewed with distrust by you.

Now if you believe any witness who has testified in this case has knowingly or wilfully testified falsely concerning any matter of fact material to the elements of the cause of action herein as defined in these instructions, his or her testimony is to be distrusted by you as to all of the matters or facts as to which he or she testified, which is to be considered in connection with what I have already said to you on that subject.

Now here is something in respect to your delib-

eration in the jury room. The court instructs the jury that this is a felony case. All twelve of your number must agree in order to find a verdict; your verdict must be unanimous. Each juror should decide for himself upon the evidence in the case and upon the law as given you by the court as to what his verdict will be. No juror shall yield his deliberate conscientious convictions as to the guilt or innocence of the defendant either at the instance of the majority of the jury for the sake of equanimity or to prevent a mistrial, but you are further instructed that nothing in this instruction is to be taken to mean that you shall not fully and fairly discuss among yourselves all the evidence and the facts surrounding this case as disclosed by the evidence or that any of your members shall not be open to conviction by honest argument by any member or members of the jury founded upon the evidence produced upon the trial or upon the law as given to you by the court.

Now again you may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law but whose testimony is reasonable and consistent with all the circumstances proved bearing upon the material issues involved in this case. Reference was made in regard to impeachment of a witness. Now the usual modes of impeachment of a witness known to the law as mentioned in the preceding instruction are, first, by proving contradictory statements previously made by the witness

as to matters relevant to his testimony in the case, or by disproving facts testified to, or by evidence as to his general bad character; but whether a witness has been impeached is solely for the jury to determine from all the evidence in the case.

Now this is in respect to claimed statements and oral admissions. Testimony as to what this one or that one said as to witnesses who have been witnesses in the case. You are instructed that the evidence of claimed statements and oral admissions of a party ought to be viewed with caution. It sometimes happens that the witness testifying to such statements or admissions by unintentionally altering a few words or expressions really used gives an effect to the statement at variance with what the speaker actually did say, but when such verbal statements are precisely given and identified by intelligent and reliable witnesses they are often entitled to great weight.

Well here is another one on the indictment. I have already told you about this but this is very well and concisely stated. The indictment in this case is only a formal written accusation of the crime required by law as an essential preliminary to a trial but in itself it is not any evidence of the commission of the offense therein set forth by the defendants or either of them. It is merely a formal charge for the purpose of putting the defendants upon trial and should not in any manner influence you in arriving at your verdict, nor should it be allowed in any way to prejudice you against the defendants in this case.

Now, gentlemen, here is something that the court should make a statement on. You have noticed some colloquies and disputes between counsel and between the court and counsel during the progress of this trial. Now you will not be influenced by colloquies or disputes during the trial between counsel or between counsel and the court or between the court and counsel, or counsel and the witnesses, or remarks or statements, or any remark or statement not based upon the evidence. You will base your verdict solely upon the evidence submitted to you and wholly disregard the remarks of counsel not bearing upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence, and any evidence erroneously submitted and afterwards excluded you will also disregard. Now that also refers to anything you may have heard about this case or read about it on the outside at any time or during the progress of this trial. You are to dismiss it wholly from your minds and make up your minds as to what your decision will be from a discussion of the evidence here and discussion of the exhibits that have been introduced in evidence in this case which you may wish to read and consider and further discuss. Now the case is based upon that, and that solely, the evidence presented here and the exhibits presented here.

Now sometimes you find a conflict in the testimony. Here the testimony is all on one side, all furnished here by the Government, and you might find conflicts in the testimony of this witness or

that witness. You might think that this witness or that witness has contradicted himself in some way and you have to consider that; that is a part of your duty, of course, and say, well, now, which is better; what weight shall I give to this man's testimony and what weight to the other one, and is there contradiction there. And upon discussing it you may find there is some way of reconciling it, and, of course, it is your duty, wherever you can, to reconcile the testimony presented to you and not put yourselves in opposition to it; discuss it freely and fairly and come to a reasonable conclusion if you possibly can. However, sometimes you find irreconcilable conflicts in the testimony, and when you do why, of course, you must then take the testimony that you believe to be worthy of your consideration and then give it such weight as you think it ought properly to receive.

Now the court has observed that you have given very close attention to the evidence in this case. I know that you all sincerely and conscientiously intend to do your full duty and resolve all the evidence that has been submitted to you consisting of the oral testimony and exhibits to the very best of your ability, and if you find that the defendant is guilty of the crime charged against him beyond a reasonable doubt, then it is your duty to convict him; if, on the other hand, after discussing it freely and fairly you resolve the evidence in favor of the defendant and you believe that the Government has not proved his guilt beyond a reasonable doubt,

then it would equally be your duty to acquit him.

Now the court sometimes comments on the evidence in the case but the court is not going to comment on the evidence in this case. You are the sole judges of the facts here; it all came out very plainly, and the court has tried to instruct you in the plainest language as to the rules of law that you were to consider and remember in applying it to the evidence, but the court always held the jury are the soles judges of the facts and they can do as they please about accepting any comments the court might make.

So it will take twelve of your number to agree on a verdict and when you retire you should select one of your number to act as foreman and he will sign the verdict when you agree. Now you may retire.

The Court: The baliffs are all sworn?

The Clerk: The baliffs who were sworn are not here.

The Court: All right.

(Whereupon the baliffs were duly sworn by the Clerk.)

The Court: Now counsel for the defense you can come forward here and make your exceptions to the instructions of the court to the court reporter without the hearing of the jury but while the jury are sitting here, and we will both look into what is going on, the Government as well.

Mr. Emigh: Comes now the defendant, Meyer

Schneider, and objects and excepts to the charge of the court, charge and instructions of the court to the jury on the following grounds.

First. That the court in its first instruction to the jury in respecting the defense of entrapment stated first as to matters concerning the defense of entrapment and then proceeded to tell the jury that the law as stated by counsel on his examination of the jury was not the law that would be given by the court.

The Court: I didn't state that.

Mr. Emigh: Without limiting it to the entrapment, the question of entrapment.

The Court: No. I stated if their recollection of the propositions of law stated by counsel in its examination of the jury on voir dire examination did not accord with the law as given by the court to the jury, they should disregard what he says about it.

Mr. Emigh: Well I might be mistaken about it, but I want to reserve it anyway.

The Court: You are mistaken anyway.

Mr. Emigh: Further, that the court in defining moral certainty defined it in the alternative and explained to the jury in the alternative that moral certainty——

The Court: No, I didn't say alternative. I defined the meaning of the words used in my definition.

Mr. Emigh: And in giving synonymal definitions that it was a degree of very, a very high degree of probability.

The Court: And even a higher degree than that.

Mr. Emigh: I think the words used by the court
“a very high degree of probability.”

The Court: A very very high degree of probability.

Mr. Emigh: And that is excepted to.

The Court: Why don't you show what I actually did say?

Mr. Emigh: Because no degree——

The Court: Let the record show I said a very, very high degree of probability.

Mr. Emigh: Well, add another “very” on then.

The Court: Put in two.

Mr. Emigh: I don't want to mis-quote the court. That no degree of probability however high can take the place of moral certainty.

And that the court's instructions as to the one party to the action producing a large number of witnesses or a greater number of witnesses than the other is not applicable in this case in that the defendant has not taken the stand or produced witnesses and the defendant's case rests upon the presumption of innocence and the failure if any of the Government to establish his case beyond a reasonable doubt.

That the instructions of the court are erroneous in defining in this case as one element of a crime criminal negligence and then in turn defining criminal negligence because the gist and substance of this case is intent and the acts or those charged to have been done must have been done intention-

ally and no question of criminal negligence can be considered by the court in relation thereto as intent is a material part of the charge.

The instructions of the court are misleading in this respect, that though the jury were told the law, abstract statutory law on the failure of the defendant to take the stand and that they could not consider that matter, nevertheless, the court in its instructions did tell the jury that they could take all facts and circumstances surrounding the case into consideration without excepting expressly therefrom the fact that the defendant did not take the stand.

Further, the defendant excepts to the refusal of the court to give instruction No. 3 as presented by the defendant in relation to the defense of entrapment.

And, further, the defendant excepts to the ruling of the court to give instruction No. 4 proposed by the defendant as to bias or prejudice of witnesses.

And, likewise, to give either in substance or effect instruction No. 5 proposed by the defendant relating to the failure of defendant to testify, and in lieu thereof giving the statutory definition, the statutory provisions relating thereto and the presumptions which must not be deduced therefrom, and without further cautioning the jury as requested in instruction No. 5 that it must not discuss, that the fact the defendant did not take the stand must not enter into their discussions or deliberations.

The Court: I did instruct them on that on read-

ing the statutory provisions that they must not consider it in their deliberations at all. Put that in the record, would you?

Mr. Angland: The Government has one point.

Mr. Emigh: That is all.

The Court: What about the Government?

Mr. Lamb: The Government does not except to any of the court's instructions, but at this time wishes the record to show that copies of the proposed instructions given to the court were not served upon the United States Attorney as required by the provisions of Rule 30 of the Criminal Rules of Federal Procedure; and that the United States Attorney does not at this time have copies of the complained of instructions nor had such copies been served upon the United States Attorney prior to the giving of those instructions and the action of the court upon those proposed instructions.

Mr. Emigh: Your Honor, may I add one exception that I overlooked?

The Court: All right.

Mr. Emigh: And that is this, your Honor; that in relation to the instructions of defendant given by the court the court indicated those to be the instructions tendered by the defendant and thereby limited their force and effect as instructions of the court.

The Court: All right.

Mr. Emigh: Let the record show we are handing herewith to the District Attorney the copies of the requested instructions.

The Court: Yes, after the case is over with.

The Court: The jury may retire.

Mr. Angland: You haven't discharged the alternate jurors.

The Court: Oh, yes, the alternate jurors are discharged. The other jurors seem to be in good health and you may be discharged from further attendance at this term and go to the Clerk's office for your settlement at this time with the Government, the two alternate jurors.

(3:15 o'clock p.m. December 15, 1949, court recessed.)

(Court resumed, pursuant to recess, at 5:00 o'clock on December 15, 1949, at which time the jury, defendant and all counsel were present.)

The Court: Ladies and gentlemen, have you agreed on a verdict?

Mr. Duncan (Foreman): We have, your Honor.

(Whereupon the baliff transmitted the papers from the Foreman of the jury to the court.)

The Court: The Clerk can read and record the verdict.

The Clerk: Your verdict, ladies and gentlemen:

In the District Court of the United States,
District of Montana, Great Falls Division

Criminal No. 8088

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MEYER SCHNEIDER,

Defendant.

We, the jury, in the above-entitled cause find the defendant guilty in manner and form as charged in the indictment on file herein.

CLAUDE K. DUNCAN,

Foreman.

The Clerk: Is that your verdict as read so say you all?

(Whereupon the jurors replied in the affirmative.)

The Court: Do you desire to poll the jury?

Mr. Emigh: Please, your Honor.

The Court: Poll the jury.

(Whereupon the Clerk polled the jurors individually.)

The Clerk: All answered in the affirmative, your Honor.

The Court: Well, ladies and gentlemen of the

jury, now that it is all over, I don't see how you could have found any other verdict, and yet I feel that the court very conscientiously instructed you as to your duties on all relevant matters and everything pertaining to the case. You are now being excused from further consideration of the case and also for the term. We have had a few other cases for trial but they have all gone off one way or another so that the jury term ends with this case and you may retire to the Clerk's office to make your settlement with the Court.

The Court: The defendant may stand up. The defendant is charged by a grand jury with the crime of offering a bribe and giving a bribe in two counts of the indictment found by the grand jury, and he came into court and was arraigned and pleaded not guilty, and has been tried by a jury, and the jury after deliberation returned into court finding the defendant guilty. Have you got any reason to give now why the sentence, the judgment of the court should not be pronounced in accordance with that verdict?

Mr. Emigh: Your Honor, would the court continue the matter of sentencing until some convenient time tomorrow, in the forenoon if convenient to the court?

The Court: We have been going over this matters and looked into it very carefully and the law is very clear and there is no reason the case shouldn't be over with tonight. There is no reason

that the sentence should be postponed. Have you any other reason? Have you anything to say?

Mr. Emigh: That is the only——

The Court: As to whether sentence should not be pronounced in accordance with the verdict of the jury?

Mr. Emigh: That is the only reason at the moment, your Honor.

The Court: Has the defendant anything to say?

Defendant Schneider: No, sir.

The Court: Would you like to say anything?

Mr. Eickemeyer: No, your Honor.

The Court: In regard to the matter?

Mr. Eickemeyer: No, sir.

The Court: Why judgment and sentence should not be pronounced in accordance with the verdict of the jury?

Mr. Eickemeyer: No, sir.

The Court: Have you got the indictment there?

The Court: On the indictment as a whole it is ordered and adjudged that the defendant in accordance with the penalty prescribed by statute be sentenced to pay a fine of three times the amount involved in the bribe, to wit: \$1500.00 or three times that amount, and serve a term of one year and six months. That is all. And he is remanded to the custody of the Attorney General and by him delivered to the proper authorities to see that the sentence is carried into effect.

Mr. Emigh: Your Honor, may I inform the court we would on tomorrow file motions in arrest

of judgment and for a new trial. I was asked to make arrangements for appeal and would ask that the defendant be permitted his liberty on the bond that is now posted in the sum of \$5,000. or such further sum as the court deems proper in the premises.

The Court: What bond?

Mr. Emigh: \$5,000, your Honor.

The Court: What does the United States Attorney have to say about that?

Mr. Lamb: Your Honor, it would depend; if it was a surety bond, it would depend to a great extent upon that bond. I am not sure it extends beyond the moment of his conviction.

Mr. Emigh: I would ask a stay of execution so [380] that the bond—we would ask the stay of execution.

Mr. Leibowitz: Your Honor, we made arrangements with National Surety Company in New York in the event of conviction here and they consented to write the bond, or Mr. Frary did.

The Court: Well it is in very general terms here. I am not familiar with this kind of a bond. Well I am inclined to continue his bond, however. Suppose you read it and see how you interpret it.

Mr. Angland: Your Honor, doesn't a bond in a case of this kind become exonerated at the time the verdict of the jury is returned and sentence imposed, and a rider might be attached to this bond that would make it continue in force, but it has been my understanding a bond is exonerated when a defend-

ant is in court and the sentence of the court is imposed pursuant to the verdict.

Mr. Liebowitz: Your Honor, in communication with New York City about the posting of bond I think that the bond is good, and we arranged an appeal bond which will probably be here tomorrow, and for all I know it may be here and authority given to the man here to execute such a bond.

The Court: Do I understand you propose to take an appeal? That is your first move?

Mr. Emigh: That is the purpose of making the record that is required. [381]

Mr. Leibowitz: We shall have the bond here. I will give the court all assurances this man won't run away. He has been responsive. He came here two or three times and I came along and I can assure you the man will be right here tomorrow.

The Court: Are you going to take your appeal tomorrow and effect all papers tomorrow?

Mr. Emigh: I doubt that it will be possible but we will do it as expeditiously as we can.

Mr. Leibowitz: I will assure the court the bond will be here tomorrow; it may be here already.

The Court: Well I will grant the stay until tomorrow morning at 10:00; and if it isn't here, I will not continue it on this bond.

Mr. Leibowitz: I will have it here tomorrow morning.

Mr. Emigh: Now, your Honor, may I ask you if the court is familiar with the essentials of all the motions that have been made; they have been before

the court and I doubt that anything will be added to them, and probably will be disposed of very promptly. Will the court at this time disclose the amount of the appeal bond so we can make arrangements?

Mr. Emigh: We take exception to the verdict.

The Court: I think he should give an appeal bond [382] of at least \$10,000. Very well, court will stand adjourned until tomorrow morning at 10:00 o'clock. Ladies and gentlemen, you are excused with the thanks of the court.

(5:15 o'clock P.M. December 15, 1949.)

In the District Court of the United States
in and for the District of Montana

United States of America
State of Montana—ss.

I, Sidney O. Smith, do hereby certify that I am the Official Court Reporter in the above-entitled court; that the foregoing and annexed transcript constitutes a full, true and correct transcription of the proceedings had and the testimony taken, which was recorded in phonography and transcribed in longhand by me, in Criminal Cause No. 8088, United States of America, Plaintiff, vs. Meyer Schneider, Defendant.

Dated this 14th day of January, 1950.

/s/ SIDNEY O. SMITH,

Official Court Reporter. [384]

United States of America
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and correct copy of the Reporter's Transcript of Proceedings had at the trial of Criminal Action No. 8088, United States vs. Meyer Schneider, as appears from the original file and records of said case in said Court, and now remaining in my custody as such Clerk.

I further certify that the costs of certifying the annexed Transcript amount to the sum of \$38.30 and have been paid by the appellant.

Witness my hand and the seal of said Court at Great Falls, Montana this April 6, 1950.

H. H. WALKER,
Clerk.

[Seal] By /s/ ELIZABETH C. McKEE,
Deputy.

[Endorsed]: Filed January 16, 1950.

[Endorsed]: No. 12501. United States Court of Appeals for the Ninth Circuit. Meyer Schneider, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana. Filed March 16, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF POINTS

1. The Judgment should be reversed and the indictment dismissed because the indictment fails to state the essential facts constituting the statutory offense of bribery.

2. The Judgment should be reversed and the indictment dismissed because the indictment in alleging the bribery of a "certain officer and person acting for and on behalf of the United States in an official function" in both counts fails to describe the duties or official function of such person and the indictment is therefore defective as a matter of law.

3. Under the statute only one offense can be committed and therefore the indictment is defective as a matter of law.

4. There is an inconsistency between the heading of Count 1 of the indictment and the body thereof rendering that count defective as a matter of law.

5. The Judgment should be reversed and the indictment dismissed on the ground that the evidence compelled a judgment of acquittal for the record discloses that Lt. Apperson had no authority or official duty in connection with the sale of Government surplus property.

6. The Judgment should be reversed and the indictment dismissed on the ground that there was insufficient evidence to establish beyond a reasonable doubt that this defendant committed the acts charged in both counts of the indictment.

7. The Judgment should be reversed and the indictment dismissed on the ground that the court erred in denying the motion for a judgment of acquittal for it affirmatively appears from the evidence herein that the officers of the United States induced, enticed, persuaded and by representation lured the defendant to commit the acts charged in both counts of the indictment.

8. In any event, the Court committed reversible error in withdrawing the issue of entrapment from the jury for the record is abundantly clear that issues of fact on the defense existed requiring its submission to the jury for their consideration.

9. It was reversible error for the Court to deny defendant's Counsel permission to examine the records of the Federal Bureau of Investigation at the time of the cross-examination of the witness Matthews.

10. It was prejudicial error for the Court to deny defendant's request to empanel a new jury when a prospective juror on the voir dire in the presence of the entire panel stated he admired Lt. Apperson.

11. The Court's refusal to permit complete interrogation of the Witness Apperson with reference to telephone calls impeded the emergence and development of proof vital to the defense and was reversible error.

12. There is a fatal variance between the indictment and the proof in that both counts of the indictment state that the person sought to be influenced in an official function is "Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base" whereas the competent proof does not bear out the indictment in this respect.

[Endorsed]: Filed June 22, 1950.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12501

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

JACOB W. FRIEDMAN,

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170 Broadway,

Borough of Manhattan,

New York City, N. Y.

LOUIS M. LEIBOWITZ,
of Counsel.

FILED

SEP 12 1950

PAUL P. JORDAN,

CLERK



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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12501

MEYER SCHNEIDER,	}
Appellant,	
against	
UNITED STATES OF AMERICA,	}
Appellee.	

APPELLANT'S BRIEF

Jurisdictional Statement

This is an appeal from a judgment of conviction of the United States District Court for the District of Montana, Great Falls Division, convicting the defendant, after a jury trial of the crime of bribery, in violation of 18 U. S. Code 201.

The jurisdiction of the District Court is conferred by 18 U. S. Code 3231. The jurisdiction of the Court of Appeals to review the judgment of conviction is invoked under 28 U. S. Code 1291.

Statement of the Case

Appellant was indicted in the United States District Court for the District of Montana in an indictment (R. 2-4) containing two counts, both under 18 U. S. Code 201. The first count is described as "offer of bribe" but alleges that

on November 22, 1948, appellant promised a certain lieutenant a bribe to influence his decision and action in a matter pending before him in his official capacity. The second count alleges the actual giving of a bribe of \$1,500 to the same person for the same purpose on November 23, 1948. Appellant moved to dismiss the indictment, which motion was denied and exception taken on December 12, 1949 (R. 4-9). He also moved for a judgment of acquittal both at the close of the government's case and the entire case, which motions were likewise denied (R. 10-15). At the same time a motion was made to withdraw the first count from the consideration of the jury on the ground that it did not constitute a separate and distinct crime but was merged in the second count (R. 15-16). All motions were denied, the appellant offered no evidence and jury found him guilty as charged (R. 17-18). He was immediately sentenced to a term of one year and six months imprisonment and a fine of \$4,500 (R. 19-22). Notice of appeal to this Court was duly filed the following day (R. 22-23). The district judge continued appellant on bail during the pendency of appeal (R. 381-384).

The Statute

The bribery statute under which appellant was convicted, 18 U. S. Code 201, reads as follows:

“SECTION 201. OFFER TO OFFICER OR OTHER PERSON.—Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof,

with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

The Facts

The facts and the evidence tending to support them will be discussed in connection with the respective points.

Appellant's requests to charge, omitted from the record through inadvertence, are appended hereto.

Summary of Grounds of Appeal

1. Neither count of the indictment describes the duties or official function of the person to whom the alleged bribe was promised or given; nor does the indictment specify the decision, action or matter involved; and the indictment is therefore insufficient as matter of law.

2. The government failed to prove that the alleged officer of the bribe had any authority or official duty in connection with the sale or disposition of government surplus property, and in other respects failed to prove the commission of a crime within the scope of the statute.

3. The prosecution made improper references to other offenses supposedly committed by appellant.

4. It was reversible error to receive in evidence the testimony of the witness Walker regarding three alleged telephone conversations with appellant in the absence of any proper foundation or identification of the person with whom those conversations were had.

on November 22, 1948, appellant promised a certain lieutenant a bribe to influence his decision and action in a matter pending before him in his official capacity. The second count alleges the actual giving of a bribe of \$1,500 to the same person for the same purpose on November 23, 1948. Appellant moved to dismiss the indictment, which motion was denied and exception taken on December 12, 1949 (R. 4-9). He also moved for a judgment of acquittal both at the close of the government's case and the entire case, which motions were likewise denied (R. 10-15). At the same time a motion was made to withdraw the first count from the consideration of the jury on the ground that it did not constitute a separate and distinct crime but was merged in the second count (R. 15-16). All motions were denied, the appellant offered no evidence and jury found him guilty as charged (R. 17-18). He was immediately sentenced to a term of one year and six months imprisonment and a fine of \$4,500 (R. 19-22). Notice of appeal to this Court was duly filed the following day (R. 22-23). The district judge continued appellant on bail during the pendency of appeal (R. 381-384).

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with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

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5. The refusal of the trial court to permit appellant's counsel to inspect memoranda used by the witness Matthews to refresh his recollection was reversible error.

6. The Court erroneously charged the jury that the crime charged could be committed by negligence, and thereby in effect negated the requirement of criminal intent.

7. The undisputed evidence discloses the existence of an elaborate plan to entice appellant to offer a bribe, so as (a) affirmatively to sustain the defense of entrapment and necessitate a judgment of acquittal; or (b) in any event to require the submission of that issue to the jury.

These matters will be dealt with seriatim.

ARGUMENT

POINT 1

Neither count of the indictment describes the duties or official function of the person to whom the alleged bribe was promised or given; nor does the indictment specify the decision, action or matter involved; and the indictment is therefore insufficient as matter of law.

The point about to be made was fully raised and protected prior to and during the trial. Appellant moved to dismiss the indictment at the outset (R. 8-9), contending (R. 4-5), "that the Indictment does not state facts sufficient to constitute an offense against the United States," and "in neither count of said Indictment does it describe the duties or official function of the said Apperson as an officer or as a person the defendant sought to bribe or did bribe." The motion was overruled and appellant's exception duly noted (R. 9, 29-30). The same ground was urged in the motion for judgment of acquittal after all the evidence was in (R. 11, 335, 348), which motion was denied and exception duly taken, and was later assigned as a basis of appeal (R. 386).

The first count of the indictment, described as "Offer of Bribe," reads as follows (R. 2-3).

"That on or about the 22d day of November, 1948, in the state and district of Montana and within the jurisdiction of this Court, Meyer Schneider unlawfully and feloniously promised money to a certain officer and person acting for and on behalf of the United States in an official function, to-wit: Harvey B. Apperson, First Lieutenant, United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base, as the defendant well knew, for the purpose and with the intent to influence the decision and action of the said Harvey B. Apperson in his official capacity and function, as aforesaid, on a certain matter then pending before him in his official capacity, as the defendant well knew, and for the purpose and with the intent to influence the said Harvey B. Apperson, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Harvey B. Apperson acting as aforesaid, as the defendant well knew, to do an act in violation of his lawful duty, as the defendant well knew, in respect to the disposal of salvage property of the United States, as aforesaid."

It is to be noted that the caption "Offer of Bribe" is in itself at variance with the first count which it purports to describe but which actually charges a promise of a bribe. Since the statute differentiates between the two offenses of offering and promising and they are not synonymous terms, a conviction being permissible on either (see *United States v. Kemler* [D. C. Mass. 1942], 44 F. Supp. 649), a doubt is immediately introduced as to the Grand Jury's intent and meaning in this count. Appellant promptly objected to the discrepancy and the objection was overruled (R. 6). That the objection is not frivolous appears from the circumstances that the description is not an endorsement or something dehors the indictment but that it appears below the indicting words, "The Grand Jury Charges," and there is necessarily a doubt as to whether the Grand Jury intended to charge an offer or a promise—

something which any defendant is surely entitled to know at the outset. Indeed, the judge himself called it an offer (R. 205). This ambiguous form of indictment gives the government an entirely unwarranted latitude in presenting proof of an equivocal character so as to enable it to take advantage of either interpretation of which the evidence may be susceptible.

The second count, with the exception of charging the following date and the actual giving of the sum of \$1,500, is couched in substantially the same language.

In order that an indictment sufficiently charge a crime under the statute involved, it is mandatory that the duties or official functions of the person bribed be alleged. That this is the law is established by a long line of authorities, several of which will be discussed.

In *United States v. Kemler* (D. C. Mass. 1942), 44 F. Supp. 649, the indictment charged a violation of Section 39 of the Criminal Code, then known as 18 U. S. Code 91 (the forerunner of the statute presently being considered). In sustaining a demurrer to and dismissing the indictment, Ford, D. J., wrote:

" * * * It is incumbent upon the government to describe the duties or official function of the person who it alleges is acting for or on behalf of the United States. Sufficient allegations are necessary to show that the person to whom the money was offered is included in the class Congress intended to protect. For this reason, the indictment is defective as there are no facts from which it appears that the person acting in an official capacity was being bribed in connection with his line of duty * * * Consequently, the indictment does charge an offense against the statute in that it does not state all the facts of which the crime was constituted."

The foregoing case is especially significant in the light of similarity of language used in the indictment therein and that employed in the case at bar. Each count of the present indictment described Apperson as "a certain officer and person acting for and on behalf of the United States in an

official function" (R. 2-3). So, in the *Kemler* case, *supra*, the indictment charged the bribery of an individual described as "an officer and person acting for and on behalf of the United States in an official capacity." Extended argument was made on behalf of the government that the words "person acting, etc." constituted mere descriptive surplusage and added nothing to the indictment; this argument was made in support of the government's contention that allegations tending to show the actual duties and functions of the person were unnecessary, but the argument was explicitly rejected by the Court, which held as follows:

"But a more difficult question to answer is whether the indictment is defective in that it charges Dr. Musgrove was an officer and person acting for and on behalf of the United States in an official capacity.

"The government attempts to meet the argument by contending it has alleged only one charge in the indictment, to wit, bribery of an officer and that the words 'person acting for and on behalf' are descriptive, surplusage and add nothing to the indictment.' To be sure an officer of the United States is usually in the performance of his duties, a person acting for or on behalf of the United States. But it is equally true that one may be guilty by bribing one not an officer as for instance an employee acting for or on behalf of the United States in an official capacity. These are two different classes of persons—cf. *Shields v. United States*, 58 App. D. C. 215, 26 F. 2d 993. I do not believe these words are descriptive and for that reason surplusage. They embrace the ingredients of a crime. *Creel v. United States*, 21 F. 2d 690, 691. Though the government could have charged bribery of an officer alone and described him as one who was acting for or on behalf of the United States in an official capacity, it did not do so. See *Henderson v. United States*, 4 Circ., 24 F. 2d 811."

The same statute was discussed in *United States v. Patterson* (D. C. Fla. 1923), 286 F. 760, where Call, D. J., granted a motion to quash, writing:

"The indictment is silent as to what department or officer of the government under which the persons were

acting or by whose authority they purported to act. 'General prohibition agents' is the way they are described in the indictment. By whom appointed or delegated is not charged. No allegation as to the duties pertaining to such 'general prohibition agents,' nor what official functions they were to perform on behalf of the United States. Allegations sufficient to show that the persons to whom the money was offered and given are included in the class Congress intended to protect from bribery are necessary to charge a violation of the section."

That the requirement of the law is not technical but substantial appears from the holding in *United States v. Gibson* (D. C. Ill. 1891), 47 F. 833, where Blodgett, J., sustained a motion to quash, holding:

"It seems therefore to me too clear to require argument that, if it is not a crime under any law of the United States for an internal revenue officer to set fire to a distillery of his own volition or impulse, without the influence or request of another, then it is not a crime against the United States for another person to bribe him to do it. The statute I have quoted makes it a crime against the United States for any one to offer to bribe an officer of the United States with intent to influence him to commit, or aid in committing, or to connive in or to allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty; but to bribe or induce such an officer to do an act not connected with his line of duty impinges upon no United States law, and does not subject the offender to indictment and punishment in the United States Courts."

The same principle underlies the holding in *United States v. Christopherson* (D. C. Mo. 1919), 261 F. 224, where in a prosecution for presenting a false voucher to an army officer a demurrer was sustained, Faris, D. J., writing:

"I therefore hold that an apt allegation that the officer, to whom the voucher in question was presented, was visited with authority to approve for payment,

or to pay such voucher, was necessary, and that lacking such allegation the indictment as to each of the five counts thereof is in this behalf defective."

One of the authorities most frequently cited in this connection is *Boykin v. United States* (C. C. A. 5, 1926), 11 F. 2d 484. That was a prosecution for bribing a prohibition agent. The indictment charged that the money was given "with the intent on the part of the defendants to unlawfully, feloniously, and corruptly influence the decision and action of the said M. T. Gonzauillas in his official capacity and function as aforesaid, on matters and proceedings then and there pending and then and there expected to soon be brought to law before him, the said M. T. Gonzauillas, in his official capacity, as aforesaid, and that the intent on the part of the defendants to influence him, the said M. T. Gonzauillas, to commit and aid in committing, colluding in, and allowing a fraud to be committed and perpetrated upon the United States, and with the intent to induce him, the said M. T. Gonzauillas, to omit to do acts in violation of his lawful functions and duties as aforesaid, all in order that violations of the National Prohibition Act should be committed and permitted in the Southern Division of the Southern District of Alabama, without detection, arrest, complaint, and prosecution". The conviction was reversed because of the insufficiency of the indictment, and Bryan, Circ. J., wrote:

"The representatives of the government knew the acts which they would rely on to show a corrupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, or what the fraud charged consisted of, or what acts it was the intention of the defendants to induce the prohibition agent to omit to do. The trial court was wholly without information as to the facts relied on, and could

not possibly have determined whether the matters complained of were such as to affect the official duties of the prohibition agent."

The foregoing holding represents a sound statement of the law relating to the sufficiency of indictments of this character, and its applicability to the indictment now under scrutiny compels a reversal of the judgment.

Another case frequently noted in this connection is *In re Yee Gee* (D. C. Wash. 1897), 83 F. 145, where the defendant was discharged on habeas corpus. Hanford, D. J., declared:

"An offer made to a person in contemplation of a mere probability that he may be called to perform official functions, and intended to influence his conduct in performance of such functions if he should be so called, does not violate this statute."

A recent application of the rule is *Blunden v. United States* (C. C. A. 6, 1948), 169 F. 2d 991. There the defendants were convicted under 18 U. S. Code, Section 201 of having given a bribe of \$31,000 and an automobile to a certain employee of the War Department to give them priority or an improper advantage over other purchasers of surplus property. In reversing the conviction and dismissing the information, the Court ruled that "the illegal act on the part of the government employee involved was outside the official functions of the employee to whom the bribe was offered". The Court also said that "although [he] had the opportunity through deception and fraudulent acts to ship out government property illegally, he still lacked the authority and jurisdiction to act in the matter, the essential element of the offense".

Soon thereafter the same Court handed down a like decision in *Zambroni v. United States* (C. C. A. 6, 1948), 170 F. 2d 272. While the memorandum opinion is predicated upon the previous decision in the *Blunden* case, *supra*, a reference to the transcript of record (at pages 8-12 thereof) shows that the defendant was charged with bribing two

officers; so far as material, the indictment alleged that defendant

“ * * * did give to said William T. Overton, Supervisor, Sugar Enforcement Division of the Office of Temporary Controls of the Office of Price Administration of the United States, and to J. W. Pattinson, Investigator, Office of Temporary Controls of the Office of Price Administration of the United States, both the said William T. Overton and the said J. W. Pattinson being persons enforcing and assisting in enforcing said General Order No. 8, issued pursuant to the Second War Powers Act, Title 50, United States Code, Appendix, Section 631 et seq., the sum of \$920.00 for the transfer and delivery to the said defendant Angelo Alex Zambroni of sugar ration documents of the Office of Temporary Controls of the Office of Price Administration, said sugar ration documents representing in value approximately 23,000 pounds of sugar, with the intent on the part of said defendant Angelo Alex Zambroni to influence the official decision and action of the said William T. Overton and the said J. W. Pattinson, by the said defendant Angelo Alex Zambroni giving to the said William T. Overton and the said J. W. Pattinson Nine \$100.00 bills of the Currency of the United States of America, the said William T. Overton and J. W. Pattinson in return therefor transferring and delivering to the said defendant Angelo Alex Zambroni sugar ration documents of the Office of Temporary Controls of the Office of Price Administration representing in value approximately 23,000 pounds of sugar, * * *.”

It was also charged that the defendant Angelo Alex Zambroni was not a

“ * * * person entitled to acquire, possess, use, permit the use of, sell, or otherwise transfer sugar, a rationed commodity, in the amounts set out hereinabove in this Count Six, nor a person entitled to acquire, use, permit the use of, transfer, possess or control such ration documents of the value hereinabove set forth in this Count Six, in the manner aforesaid, * * *.”

Defendant urged in appealing his conviction in that case that an indictment alleging the bribery, or offer to bribe, certain officials, which did not describe their official duties and functions or show the relation thereof to the subject of the bribe, did not state an offense against the laws of the United States. Although it is obvious that the Zambroni indictment was far more explicit than the one presently under consideration, Zambroni's conviction was upheld and the conviction was reversed.

The general rule as to the requirements of indictments was stated in *Pettibone v. United States*, 148 U. S. 197, 37 L. Ed. 419, "that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital". See authorities cited in *Kellerman v. United States* (C. C. A. 3, 1924), 295 F. 796, 799.

The question has frequently arisen in state courts and under parallel statutes with the same result. Several helpful cases will be briefly noted.

In *Taylor v. State*, 42 Ga. App. 443, 156 S. E. 623, the Court quoted with approval the well established rule set forth in 4 R. C. L. 185:

"It is * * * a universal principle that where the act is entirely outside of the official functions of the officer to whom the bribe is offered, the offense is not bribery."

The Court went on to declare that the rule that a person could only be bribed to do or not to do something in the line of his official duty was so generally recognized and so clearly of the very essence of a bribery statute that further citation of authority was deemed unnecessary.

Similarly, in *Selvidge v. State*, 126 Tex. Cr. 489, 72 S. W. 2d 1079, the Court held insufficient an indictment charging the appellant with having paid a certain sheriff a sum of money to permit the transportation of intoxicating liquor.

The Court declared that it was not within the sheriff's official duty to issue a permit to any one for the transportation of intoxicating liquor; that he could not legally issue such a permit, and therefore could not legally refrain from doing that which he was not by law authorized to do so as to constitute bribery.

In *Sugarman v. State*, 173 Md. 52, 195 A. 324, it was held that an attempt to bribe an officer engaged in making an unlawful arrest did not constitute bribery, the Court saying that the offense could occur only when the officer was engaged in the performance of his official duties.

Both the state and federal cases are reviewed in *State v. Butler*, 178 Mo. 272, 77 S. W. 560, where it was said:

"There is no rule so uniformly adhered to by the courts, both state and federal, as the one 'that there can be no bribery of any official to do a particular act, unless the law requires or imposes upon him the duty of acting.' It is bottomed upon the sound and logical principle that he cannot be influenced to do something that he has no power or authority to do.

* * * * *

"The very purpose of the statute is to prevent public officials from being influenced in respect to questions upon which they are authorized to act. How can an officer be influenced to act when there is no law requiring him to do so, and no power under the law authorizing him to act?"

Likewise, in *Schraeder v. People*, 73 Colo. 400, 215 P. 869, an information charging that the accused, a duly elected and qualified sheriff, had charged and received money for omitting and delaying to execute a warrant was insufficient in the absence of an averment that the warrant was delivered to or received by defendant and that its execution was one of the duties of his office.

In *Hill v. State*, 130 Tex. Cr. 362, 94 S. W. 2d 733, an indictment charging an officer with accepting a bribe to

permit a prisoner in his custody to escape was insufficient in law in the absence of an allegation that he had legal custody of the prisoner.

Viewed in the light of the controlling authorities, it is quite evident that the indictment now being examined does not measure up to the minimum requirements of law and fails to charge the commission of any crime under the statute. Consequently, no conviction can lawfully be predicated thereon.

Wholly apart from the foregoing objections to the indictment, appellant unsuccessfully moved prior to the commencement of the trial for the dismissal of the indictment (R. 4-8) on the grounds that it was too vague, indefinite and uncertain as to the facts charged; that it failed to inform the defendant of the nature of the acts alleged to have been done by him constituting the offense in either count; that it did not inform defendant in what respect the decision and action of the person or officer was intended to be influenced; and that it failed to allege either the matter that was then pending before the officer or the nature of the unlawful act defendant had attempted to induce the officer and person to do. In these respects the indictment does not measure up to the minimum requirements of law. Moreover, the deficiencies are of a character not cured or aided by verdict.

The point is one that has frequently been litigated, and the authorities uniformly exact from the government a strict conformity to the requirement of precise and sufficient allegations. So, in *Harris v. United States* (C. C. A.

), 104 F. 2d 41, it was held that allegations of essential elements of a statutory offense were matters of substance and not of form, and their omission was not aided or cured by verdict. Likewise, in *United States v. McGuire* (C. C. A. 2), 64 F. 2d 486, cert. den. 290 U. S. 645, 78 L. Ed. 560, defects in a lottery ticket indictment were held to be substantial and not curable. Most specifically, the failure of an indictment against an assistant postmaster to identify forged paper or record as to which

a false entry was allegedly made was not cured by a guilty verdict and could not be supplied by intendment or implication. *Harris v. United States* (C. C. A.), 104 F. 2d 41. To like effect, see *White v. United States* (C. C. A.), 67 F. 2d 71, and *Brenner v. United States* (C. C. A.), 287 F. 636.

The application of these rules to the indictment under consideration discloses that the accused could not possibly glean therefrom the matter then pending before Apperson, character of the decision or action intended to be influenced, or what unlawful act he was supposed to be attempting to induce. On this ground alone, irrespective of everything else, the indictment must therefore fall.

POINT 2

The Government failed to prove that the alleged offeree of the bribe had any authority or official duty in connection with the sale or disposition of Government surplus property, and in other respects failed to prove the commission of a crime within the scope of the statute.

An examination of the statute with whose violation appellant is charged discloses that the gravamen of the offense is an intent to influence the decision or action of the offeree of the bribe in a matter pending before him in his official capacity, or causing that person to collude in the commission of a fraud, or the inducement of that person to do any act in violation of his lawful duty. Unless the case presents an influencing in an official capacity, attempted collusion in the perpetration of fraud or an inducement to do something (or omit to do something) in violation of an official duty, the crime is not established. It is therefore evident that the various authorities calling for precision in the allegations of the indictment to show facts constituting one of the aspects of the crime, do not represent any technical concession to pleading technicality

but are a substantial recognition that no one may properly be accused of crime where the components of the alleged offense do not come within the purview of the statute.

An examination of the evidence herein fails to reveal that Lieutenant Apperson could fairly be described as coming within any one of the classifications of individuals specified in the law. If we attribute to the evidence adduced by the government the construction least favorable to appellant, we find that it tends to show the making of an agreement between Apperson and appellant (largely, as we argue aliunde, at the rather marked instance of Apperson) to permit appellant to include in the merchandise legitimately purchased by him certain other merchandise which was the property of the government and for which no payment was to be made. If this was the fact, the acts of appellant constituted a larceny with the cooperation of Apperson. Nothing herein contained is designed, of course, to reflect upon the honesty of Apperson or to impugn the motives with which he acted—although we contend him to have been sufficiently misguided as to constitute his acts a species of entrapment. The important fact in the entire situation is that Apperson, as the record abundantly establishes, had no duty or official capacity whose performance or omission made it the possible statutory subject matter of a bribe. To take an extreme case, had the appellant walked into the office of the Air Corps and offered a telephone operator a sum of money if she permitted him to steal certain merchandise, and she agreed (whether dishonestly or with a view towards apprehending the appellant), it could not be seriously urged that appellant would thereby be violating 18 U. S. Code 201. The patent reason why he could not be prosecuted in that fashion would be that the telephone operator had nothing to do with the merchandise or its handling; ergo no payment to her to collude in pilferage could constitute the statutory offense. The fact that her knowledge of contemplated illegality put her in a position where she could report and prevent it would not alter the situation within the meaning of the law. As to Apperson, while his situation was ad-

mittedly not so clear, a study of all of the pertinent evidence on that subject shows that his official functions and duties did not embrace the delivery of the merchandise allegedly attempted to be stolen. The proper determination of this point necessitates a thorough study of the entire record, and it would extend this brief to a prohibited length if all the evidence bearing on the subject were to be detailed *in extenso*. However, we shall point out several highlights of the proof serving to show that the acts involved were not comprehended within his duties or functions and tending affirmatively to establish quite the contrary.

To begin with, the government offered in evidence as its first exhibit a copy of a certain technical manual which was supposed to be similar to the one governing his official conduct as an air base salvage officer (R. 67-69). This was a book of some 700 pages, and the prosecutor read lengthy extracts therefrom into the record (R. 70-77). Without repeating these in full, we desire to indicate that he was required to exercise supervision over transactions; to supervise the classification, storage and disposition of salvage; to maintain records and inspections; to deliver no property to a buyer until payment had been made, to prevent dishonest practices in weighing property and the like. The government also read excerpts from the procedure relating to competitive bidding and spot negotiated sales (R. 73-75). However, appellant's request that the government be required to designate specific portions of the manual was denied, the Trial Court suggesting that the jury consult the index (R. 331-332).

Obviously, if Apperson had the authority to make a spot sale of the government property involved, his delivery thereof to appellant without payment would have been a deviation from his duty which would bring the case within the scope of the statute. However, it appeared on direct examination that his only authority in this record was in the matter of scrap lumber. Thus he testified (R. 101-102):

"Q. Did you have any authority at any time during the month of November, 1948, to accept money pay-

ments for any surplus scrap or salvage property of the United States Government that would be removed from the Air base or the control assumed by any purchaser or any other person? A. I did have authority to sell scrap lumber, but specifically scrap lumber and only scrap lumber.

"Q. Did you have any authority at any time during the month of November, 1948, to accept money in payment of any scrap or surplus property of the United States Government, the property consisting of overcoats, parkas, field jackets, blucher boots, or any clothing item? A. No.

"Q. To whom were all payments required to be made for any such items during that month? A. To the purchasing and contracting officer.

"Q. Who was then Lieutenant Greene? A. That is right, it was then Lieutenant Greene."

More specifically, on cross-examination Apperson testified that he could not have legally accommodated appellant so as to permit the removal of the merchandise that evening (R. 149), saying (R. 150):

"It is exactly the same as taking anything that doesn't belong to me. * * * I couldn't have done it legally."

Moreover, Apperson's superior, Lt. Greene, had ruled that no government handling would be furnished for the removal of merchandise, and Apperson's act in furnishing the labor was simply an accommodation to appellant (R. 154).

It is important to point out furthermore that Apperson could not have lawfully delivered the property in question to appellant even though appellant had paid for it, as appears from the following in his testimony (R. 191-192):

"Q. Well, is there any manual which gives you the right to send the merchandise through to New York City as in this Case? A. No.

"Q. Without getting paid for it and without asking anybody's permission? A. No.

"Q. As a matter of fact there isn't any such, you couldn't find any such permission in there, could you?

A. No. I am guessing that. I have never done this before so I don't know.

"Q. In other words, you wouldn't last a minute if you ever took stuff right out of that warehouse? A. That is right.

"Q. Without the permission of somebody in authority? A. That is correct.

"Q. And put it on that car and send it off; even if you were paid for the merchandise, you couldn't do it?

"A. I don't know. All I know is I am responsible for a certain amount of Government property.

"Q. As a matter of fact if you were able to get a million dollars for stuff worth ten thousand dollars, you couldn't get that stuff or send it off? A. That is correct.

"Q. It would have to go through a certain amount of red tape? A. In have in other cases.

* * * * *

"Q. I will go further. Would you ship it to him even if you got paid one hundred thousand dollars? A. No, not if I were paid one hundred thousand dollars.

* * * * *

"Q. Now if you received a hundred dollars as an individual from Mr. Schneider for stuff worth a maximum to the Government of \$36,000, and you take that check and turned it into the Government, would you be permitted to accept it in that form? A. I understand what you are getting at. I can't make any spot negotiation sale for \$100 or \$10,000.

"Q. And this was not a spot negotiation sale? A. It was not."

The lack of Apperson's authority to permit the withdrawal of any merchandise under any circumstances is further established by the testimony of the government witness Aulgur (R. 230-231):

"Q. Well, what would you require of a purchaser to do before you would start loading the merchandise? A. Either he would have a slip from the contracting officer stating the fact that he had paid the balance or a call from the contracting officer stating that he had paid it.

"Q. In other words, the release of the merchandise would have to come from the contracting officer? A. Yes, sir.

"Q. Is he the only man who has the authority to release the merchandise after it has been paid? A. Yes, sir.

"Q. And the contracting officer wasn't Lieutenant Apperson, was it? A. No, sir.

"Q. Lieutenant Greene, is it? A. Yes, sir."

If the process of withdrawing additional merchandise were to be likened to a spot sale, on this particular subject Apperson pointed out to appellant that authorization therefor had to come from the Commanding General of the Air Material Command, and, to use the language of the witness (R. 87), he "very carefully explained it to him I had no such authority". Special Officer Matthews correctly viewed the transaction as tantamount to larceny, testifying (R. 284), "it was rather apparent to both of us what it would amount to in other circumstances the stealing of property would not be right".

The indictment describes Apperson as "Air Force and Base Salvage Officer" (R. 2-3). In attempting to prove his authority, the government introduced (R. 141, 340) Exhibit 7 a certain special order giving Lt. Apperson, among other things, "primary duty as salvage and property disposal officer". Evidently realizing that this was not in accordance with the indictment, the government sought over objection to introduce proof by Major Redding (R. 140-142) that this order made Apperson the Base Salvage Officer. The discrepancy, we submit, especially in the light of the other testimony indicating Apperson's extremely limited powers, was such a variance as to constitute a failure of proof.

In this same connection it becomes important to examine the contents of the indictment itself (R. 2-3), wherein it is charged that defendant promised and gave the bribe "with the intent to influence the decision and action of the said Harvey B. Apperson * * * in respect to the disposal of salvage property". The record can be searched in vain

for the slightest indication of any decision or action then required to be officially taken by Apperson. With regard to any salvage property whatsoever the instruction manual placed in evidence prescribed a detailed routine for its sale or disposition. Nothing contained in that work or in any of the evidence discloses that Apperson could have ordered the removal of merchandise from warehouse 1045 or for that matter from any other locality without complete conformity by the recipient with the entire routine of public sale and competitive bidding; in the case of spot sales it was clear that Apperson's authority was limited to the disposition of scrap lumber; and Apperson specifically testified that no proceeding looking towards the disposition of property could in any event be inaugurated without the prior approval and cooperation of Lt. Greene. Accordingly, the consummation of a scheme whereby appellant or any person might obtain salvage property without paying for it would have necessitated obtaining the sanction of the various higher officers, to say nothing of a complete revision of the manual, and the limitation of Apperson's own meager authority was such that he could not on any construction of the regulations or the evidence be viewed as an officer in a position to effect a delivery or transfer in violation of some supposed duty. We may go further and say that the concurrence of all persons in the hierarchy would not have sufficed to effect a removal of the merchandise in warehouse 1045 to appellant. That could be accomplished lawfully only in a certain way. There was actually nothing for Apperson to decide and no action to be taken by him. Therefore, a payment to him in some illusory connivance or permission did not constitute an influencing of decision or action (the language of the indictment) in respect to the disposal of salvage property so as to constitute appellant guilty of the crime charged in the indictment. No matter how appellant's acts are viewed and to what criticism they may be subject, this could not compensate for the failure to show the giving of a bribe not directly related to the performance of an official function.

The utter absence of this element requires the dismissal of the indictment as in *Blunden v. United States* (C. C. A. 6, 1948), 169 F. 2d 991—where there was no entrapment at all and defendant's acts were denounced by the Court.

In arguing the insufficiency of the indictment in the preceding point, we indicated its over-all vagueness and its omission to specify the matter supposedly pending before Apperson, the nature of the decision or action sought to be influenced and what unlawful act appellant attempted to induce. In short, the prejudice to appellant from these crucial omissions was such as to vitiate the indictment and render it insufficient as matter of law. One might suppose that the trial and the production of evidence would supply what the indictment lacked, but after a reading of the record one is confronted with the same questions. What matter was pending before Apperson for official action? What decision was he supposed to make? What action was he called upon to take? What unlawful act and what violation of duty did appellant induce? In other words, just as the indictment was fatally defective in its failure to charge these matters, so the proof was silent upon all of these cardinal and indispensable factors. Indeed, the evidence in a way supplies an answer to the natural query of why the government failed sufficiently to charge the supposed crimes, and that answer consists of the fact that the provable acts did not and could not supply the necessary subject-matter of the allegations. To sum up the situation, no violation of the statute could be charged for the simple reason that no such crime could be proved.

POINT 3

The prosecution made improper references to other offenses supposedly committed by appellant.

In his opening address to the jury the Assistant United States Attorney said (R. 51):

“Lieutenant Apperson will testify that in the course of the afternoon and the various conversations that he

had with the defendant the defendant told him he operated on a very large scale in all the eastern depots; that in one particular place he had a man there who got the commodities as they came on to the depot and short-counted them and set aside materials for him so he was able to get it, and most of these commodities would never reach overseas destinations because they would go to other salvage operators who operated on that basis in the east. He said he made a practice of making bids on salvage property around at various places in the United States and after securing the bid he then put a claim into the United States Government that the commodities were not as represented to him and asking for damages, and that he had political influence in the east and that he obtained assistance in getting those claims of damages allowed. * * *

Defendant's counsel immediately interrupted and charged that this narrative was prejudicial, whereupon the Court stated (R. 51-52):

"The Court: Well, his admissions are on other offenses he committed. The jury would be warned in the instructions as to that that they are not to consider and I doubt whether he could prove other offenses that might be admitted or testified to."

The prosecutor himself quite evidently realized that he had done something wrong, for he thereupon said (R. 52):

"Mr. Lamb: Well, if the court please, in the feeling that perhaps I may have overstepped the bounds of propriety I will apologize to court and counsel and to the jury and if any evidence of that sort is not admissible and is not admitted in evidence I, of course, will join with the court and other counsel in asking the jury to completely disregard anything I might say that is not borne out by the witness."

Defendant's counsel thereupon took exception to the very prejudicial remarks that had been made, and the objection was repeated when the opening was finished (R. 57).

When the witness Apperson was asked about discussions with appellant regarding further activities at other depots, an objection to such evidence was sustained (R. 99).

In the midst of the trial the witness Aulgur was asked regarding a further conversation with appellant. Objection was taken to this proposed line of testimony, it was overruled and exception duly taken, whereupon the witness testified as follows (R. 220-221):

"Mr. Schneider referred to the property laying on the floor and asking if some kind of a deal couldn't be made. I informed him the property had been listed for sale and would be published in the very near future and if he cared to, he could look the property over and I would give him a form showing the property so he could submit a bid. And as I started to go after the form he made the remark that he thought I misunderstood him; he meant just a deal between the two of us."

The net result of the foregoing combination of improper opening and improper evidence was to depict appellant as one who made it a practice of conspiring to create fraudulent claims against the government and of furthering them by political influence; also that he had made illegal overtures to Aulgur. None of these matters were charged in the indictment, nor were they admissible on any theory of a requirement to show motive or intent in a situation otherwise ambiguous. Their sole effect, if not purpose, was to impute other crimes to appellant and to vilify him in the eyes of the jury and preclude a dispassionate consideration of the case on the merits.

We submit that the introduction of matter of this sort constituted a grave invasion of appellant's rights. He was entitled to a trial on the material issues, unaffected by the introduction of irrelevant and improper matter having no direct bearing on the question of guilt or innocence. Not taking the stand, he could not be confronted with evidence of other supposed derelictions. Nevertheless, by reason of the unfortunate occurrences referred to above, effective hints were brought home to the jury that appellant was a man of criminal and dishonest propensities. It is difficult to conceive of anything more truly calculated to insure a

conviction—especially in a case wherein there was considerable doubt of whether the acts charged were those denounced by the statute—than importing to the jury that appellant was an old hand at this sort of thing. There is no need at this late date to argue anew the proposition that the government may not as part of its affirmative case introduce evidence or intimations of the commission of other crimes by a defendant. Such matter was barred in the leading case of *Boyd v. United States*, 142 U. S. 450, 35 L. Ed. 1077. There, on a trial for felony, evidence of other crimes committed by the defendant, was held inadmissible for the identification of the defendant or for any other purpose whatever where those crimes were wholly apart from the inquiry as to the current crime and the defendant might have committed the others and yet have been innocent of this one. Moreover, the error of admitting such evidence was held not to be cured by the judge's charge that defendant was not to be convicted because of the commission of such other crimes.

As a general proposition, the Supreme Court of the United States further held that the prosecution could not, in a criminal case in any Federal court, resort to any kind of evidence of a defendant's evil character to establish a probability of guilt. *Greer v. United States*, 245 U. S. 559, 62 L. Ed. 469. The only point at which such proof is admissible is in connection with impeachment of a defendant or his witnesses—and not as part of the prosecution's case (barring, of course, the exceptional instances where it becomes necessary to prove motive, intent and the like). As Mr. Justice Jackson stated, in *Michelson v. United States*, 335 U. S. 469, 93 L. Ed. 168:

“Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U. S. 559, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation

on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The same Justice also recently remarked, in his concurring opinion in *Krulewitch v. United States*, 336 U. S. 440, 93 L. Ed. 790:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States*, 332 U. S. 539, 559, 92 L. Ed. 154, all practicing lawyers know to be unmitigated fiction."

The cases wherein the reception of evidence of this type has been condemned are so numerous, and the rule so firmly entrenched in our law, as to dispense with the need for extended citation. Several well-reasoned illustrative authorities are *Templeton v. United States*, (C. C. A. 6, 151 F. 2d 706; *Smith v. United States* (C. C. A. 9), 10 F. 2d 787; *United States v. Dressler*, (C. C. A. 7) 112 F. 2d 972; *Sang Soon Sur v. United States*, (C. C. A. 9) 167 F. 2d 431.

The utter impropriety of the references had the effect of depriving appellant of a fair trial, and are sufficient in and of themselves to call for a reversal of the judgment.

POINT 4

It was reversible error to receive in evidence the testimony of the witness Walker regarding three alleged telephone conversations with appellant in the absence of any proper foundation or identification of the person with whom those conversations were had.

The government called as a witness one LaVaughan Walker, who was an Air Force private assigned as typist and clerk in the salvage office at the time of the alleged offense (R. 207-208). He testified that in October, 1948, he received several telephone calls from an individual who identified himself as Meyer Schneider, of New York City. Appellant promptly objected to this testimony (R. 208) on the ground that no proper foundation was laid through recognition of the voice of the other party or otherwise (R. 208-209). The omission was not supplied throughout his testimony, and repeated exceptions were taken (R. 209, 210, 217).

The conversations thereby imputed to appellant were to the effect that appellant wanted to know what sort of goods were included in the merchandise as to which his bid had been accepted (R. 210-211), whether there was an overage in the materials, whether any socks were included and whether they could be separated from the other materials (R. 210-212). The witness also testified that the individual at the other end of the phone said (R. 213), "I am just an everyday guy; can you help me out?" The Court declared that this testimony was "certainly relevant" (R. 212-213), and it is clear that the purpose of introducing it was to show that appellant was laying the ground work for some ulterior approach. Of course, this was flatly at variance with the theory of defense attempted to be developed on cross-examination of Apperson that appellant came to Montana at the instance and solicitation of Apperson. Accordingly, if the evidence was not competent, it was clearly prejudicial.

The incompetency of the evidence appears from a line of authority applicable both to criminal and civil cases, the essence of which is concisely stated in *Bonner Mfg. Co. v. Tannenbaum*, 169 N. Y. S. 43, where Guy, J., wrote:

“‘One who has held a conversation by telephone with another person, stated to have been the defendant, cannot testify as to what that person said, unless he recognized his voice, or his identity has been established with reasonable certainty by other evidence. And this is so, although he testifies that the person answering him said he was the defendant, if the witness cannot state that he recognized the defendant’s voice.’ *Mankes v. Fishman*, 163 App. Div. 789, 149 N. Y. Supp. 228.”

The mere fact that the witness said that the person speaking to him purported to be the appellant is not a sufficient identification to render the evidence of the conversation competent. *Robilio v. United States* (C. C. A. 6, 1923), 291 F. 975, cert. den. 263 U. S. 716, 68 L. Ed. 522; *Wallace v. United States* (C. C. A. 6), 291 F. 972. It is the general rule that the witness must recognize the declarant’s voice. *United States v. Frankel* (C. C. A. 2 1933), 65 F. 2d 285, cert. den. 290 U. S. 682, 78 L. Ed. 588.

Under the foregoing circumstances it is obvious that the reception of this evidence was in violation of well-established rules and was clearly injurious to appellant.

Before concluding our discussion of this point, we desire to urge, in accordance with the argument and authorities set forth in the preceding point, *supra*, that even if this particular evidence were adjudged competent and the obstacle of failure to identify appellant’s voice were overcome, the evidence of alleged telephone conversations occurring prior to November 22nd and November 23rd, the dates specified in the indictment, was irrelevant and immaterial to the issues being tried. Objection and exception were seasonably taken (R. 220-221) on the ground that these matters had nothing to do with the indictment, and they were nevertheless received. They had a tendency to be-

cloud the issue and introduce collateral matters with the evident purpose of depicting appellant in a dishonest light and thereby precluding a fair determination on the matters that actually were pertinent. The testimony of the witness Aulgur (R. 220-221), more fully discussed under Point 3, is subject to the same criticism. The case could properly turn only on the conversations and transactions had between appellant and Apperson, as charged in the indictment. Supposed conversations with others were strictly *res inter alios acta*, and should not have been permitted, especially in view of the patent prejudice to appellant's cause. The procedure of the prosecution whereby these extraneous matters were brought to the attention of the jury was plainly violative of defendant's rights, and must be so regarded irrespective of whether a proper foundation for the proof was laid.

POINT 5

The refusal of the Trial Court to permit appellant's counsel to inspect memoranda used by the witness Matthews to refresh his recollection was reversible error.

Special Agent Matthews testified at considerable length regarding his alleged conversations with appellant (R. 270-274) after the arrest, and the evident purpose of this proof was to corroborate Apperson's testimony concerning his dealings with appellant. In the course of this testimony of Matthews the witness, at the suggestion of the Court and the Assistant United States Attorney, referred to the notes made by him at the time (R. 272-273) and refreshed his recollection thereby. Soon thereafter (R. 280-281) appellant's counsel requested permission to examine the notes, this permission was refused and exception duly taken.

This ruling was contrary to the established law, which is concisely stated in Underhill on Criminal Evidence, 4th Edition, Sec. 395, as follows:

“Memoranda used by a witness to refresh his memory must be made available for inspection and use of the adverse party.”

Federal courts have uniformly held to the same effect, as appears from the decisions in *Brownlaw v. United States* () 8 F. 2d 711; *Taylor v. United States* () 19 F. 2d 813; *Lennon v. United States* () 20 F. 2d 490; and *Luse v. United States* () 49 F. 2d 241.

The denial of this important right to appellant foreclosed a significant avenue of potential cross-examination, and the very unwillingness of the government to make the data available is indicative of an intent to withhold information of a probable value to the defense.

POINT 6

The Court erroneously charged the jury that the crime charged could be committed by negligence, and thereby in effect negated the requirement of criminal intent.

In charging a jury in a bribery prosecution, “the court must instruct the jury as to the necessity of the existence of a criminal intent” (11 C. J. S. 875). On this phase of the case the Court below began by saying (R. 364):

“Now, of course, intent, the intent is always an element, necessary ingredient to be established in a case of this kind.”

So far the charge is correct, but then the Court proceeded to instruct:

“This is a felony case and the jury before they can convict the defendant must find here in this case be-

yond a reasonable doubt a joint operation of act and intent, or what we call in law criminal negligence. Now criminal negligence in that connection means the doing of an act with a reckless disregard of the consequences, not caring particularly what happened."

Due exception was taken to this portion of the charge (R. 375-376).

There is no reason whatsoever for the introduction of this confusing and altogether inapplicable element into the case. We are aware of no reported decision where the crime of bribery was held to have been committed, or capable of commission, by negligence however aggravated. As was declared in *Harris v. United States* (C. C. A.), 8 F. 2d 841, it is essential to the offense that the offer, promise or gift be made with a corrupt and dishonest intent to influence the officer in the discharge of his official duties (see also 11 C. J. S. 844), and no degree of carelessness can operate as a substitute for the requisite intent. The charge given permitted the jury to speculate that appellant may have recklessly given Apperson a gratuity—without the specific criminal intent called for by the law—and they may have adjudged him guilty in consequence. The charge as given was manifestly prejudicial and contrary to law.

POINT 7

The undisputed evidence discloses the existence of an elaborate plan to entice appellant to offer a bribe, so as (a) affirmatively to sustain the defense of entrapment and necessitate a judgment of acquittal; or (b) in any event to require the submission of that issue to the jury.

When a defendant has been officially enticed to commit a crime, he has a valid defense of entrapment. Specifically in the case of the offense of bribery, where the idea therefor emanates from the offeree or is so furthered and en-

couraged as to induce or effectively stimulate its perpetration, the defendant may not be adjudged guilty.

Cases have frequently arisen under 18 U. S. Code Sec. 91, the predecessor of the statute involved herein, wherein the defense of entrapment has been held tenable—either from the standpoint of calling for an acquittal or from that of requiring appropriate instructions to the jury. So, in *United States ex rel. Hassel v. Mathues* (D. C. Pa. 1927), 22 F. 2d 979, where the relator's brother had approached prohibition agents with the offer of a bribe and those agents demanded the presence of the relator, the subsequent charge of bribery brought against the relator was held to be the result of illegal entrapment. And in *Gargano v. United States* (C. C. A. 5, 1928), 24 F. 2d 625, it was held that if the idea of bribery originated in the mind of the government officer rather than in defendant's, the defense of entrapment was complete and the establishment of such a defense entitled the accused to an acquittal. Even an intermediary transmitting bribe money from one desiring protection to a government agent may not be guilty if his act was induced by entrapment, according to *Ybor v. United States* (C. C. A. 5, 1929), 31 F. 2d 42. Likewise, in *United States v. Lynch* (D. C. N. Y. 1918), 256 F. 983, entrapment was held a defense to an indictment for offering to bribe a government official to influence favorable action by the official upon awarding a contract to the accused. That the question may properly be one for the jury appears from *Capuano v. United States* (C. C. A. 1, 1925), 9 F. 2d 41, where in a trial for the bribery of federal prohibition agents the refusal of requested instructions on the subject of entrapment was held error.

As will be presently shown, much of the evidence on this trial, both by direct testimony and what was elicited on cross-examination, was strongly indicative, if not conclusive, that appellant was entrapped. A motion for judgment of acquittal on this ground (R. 339) was made and denied (R. 348), with due exception taken. An instruction

on the subject of entrapment was expressly refused (R. 351), and excepted to (R. 352), and the jury was told (R. 360-361) :

“ * * * The court feels that it is its duty at this time to advise you that there is no defense of entrapment in this case, so that you will forget what was said by counsel in his examination of you on your voir dire examination, anything in respect to the question of entrapment as a defense here.”

Further exceptions on the point were also taken (R. 374, 376). It is therefore abundantly clear that all aspects of the question were adequately raised, presented and reserved.

We now come to an examination of the record with a view towards determining what it contains to substantiate the defense of entrapment. Of course, this is a matter not to be weighed by the inspection of mere excerpts, but is peculiarly one which calls for a study of all the proof; naturally our stress of certain elements is not to be regarded as suggesting the exclusion of everything else. The prosecution was concerned about the question, for in the very opening it was said that after Apperson procured authority from the army to cooperate with the Federal Bureau of Investigation and the United States Attorney's office (R. 46) :

“ * * * Lieutenant Apperson was very carefully cautioned that in no particular should he encourage the defendant, Meyer Schneider, but to let him take the reins, as the saying might be, and to be the driving force and merely accede to any wish of the defendant's he might express and just let him go and see how far he would go. Lieutenant Apperson expressed a willingness to cooperate. * * * ”

Apperson testified that on the occasion of his first meeting with appellant, the latter examined certain shirts, trousers and other items in the warehouse and inquired how he might obtain them (R. 86-87). Apperson said that this

would mean a spot sale, as to which he "very carefully explained to him I had no such authority"—something most significant on another phase of our argument (Point 2). Since appellant had already made a legitimate purchase of other property, "he wanted to know if maybe we could swap or get together" (R. 87). This in itself is certainly ambiguous language. The witness evidently did not understand the remark *in mitiori sensu*, for his response was (R. 87), "I then didn't commit myself much one way or the other." However, the witness thereupon offered to show appellant the merchandise he had purchased and drove him from the office to the salvage yard (R. 87). When appellant supposedly stated that he was prepared to pay "to substitute some of the useful items for this scrap" (R. 88), the witness "indicated then I didn't want to have any part of it" (R. 89). Then they went to a coffee shop together, where, the witness said (R. 89-90), "I told him, well, I was very non-committal, I didn't say one way or another." When appellant had left, Apperson reported to the Officer of Special Investigation that an attempt had been made to bribe him, whereupon the Federal Bureau of Investigation, the Base Commander and the United States Attorney swung into action with the very evident purpose of contriving that this matter should not end then and there (R. 90-94). As Apperson stated to Mr. Matthews, the Federal Bureau of Investigation agent (R. 92), "I indicated my willingness to cooperate in any way I could." If appellant had any original evil intent and Apperson showed himself to be non-committal, there surely was a *locus poenitentiae*, but the law enforcement officials and the higher army officers—including Colonel Chennault, who was Base Commander, and Colonel Abdalah, Staff Judge Advocate (R. 92)—acting in conjunction with Apperson, were manifestly determined that this was a fish to be hooked.

So, on the following afternoon Apperson met appellant in the little Base Salvage office, where, as he described it (R. 94),

"I pitched a jacket file in front of Schneider; that jacket file contained a complete list of the useful items, useful salvage items that we have in storage as salvage at that time * * *. He opened it. I did indicate to him or point to the total value, that is the original purchase price to the Government. I pointed to that. Schneider shook his head and then shook his head and indicated that was accepted."

Here we have a vivid picture of Apperson actually submitting to appellant a list of items of merchandise and the appellant shaking his head to indicate acceptance. It must be remembered that Apperson was supposedly acting on the instructions of his superiors and Special Agent Matthews, who was himself an attorney (R. 275), and was presumably attempting to avoid any semblance of entrapment. Nevertheless, the foregoing excerpt, even after we make due allowance for the intent of the witness not to disclose himself as the initiating force, affords a striking analogy to the legal concept of the making of a contract with Apperson in the role of the offeror while appellant "shook his head and indicated that was *accepted*." The jacket file will be discussed again below.

After this "acceptance," according to the witness, appellant said nothing, and the very next thing we find happening is that Apperson explains to appellant as follows (R. 95):

"I explained to Schneider then that he would have to pay my boys or my enlisted men for loading the stuff and it would have to be loaded after hours * * *."

So, in addition to furnishing a list of suitable items to appellant, the witness went ahead to explain the procedure whereby the goods were to be taken away. After he "advised him of that situation" (R. 96), appellant agreed to the arrangements and then (R. 97), "We went to the freight car and started loading the clothing which was put up in cartons into this truck to haul to the freight car." Sergeant Aulgur testified that it was Apperson who gave instructions

as to the manner of loading (R. 223-224). After the truck was loaded (R. 98), "We followed the truck down to the freight car and watched the men unload it into the freight car." This activity took from 4:30 until about 6 P. M. (R. 99-100).

The witness and the appellant then went to Murrill's Bar, where they had a few drinks (R. 107). Apperson left appellant and went into the men's room, where Special Agent Matthews searched him as part of the plan (R. 107). Apperson and appellant left the bar and walked down Central Avenue to the Park Hotel, where they went up to appellant's room (R. 108) under these circumstances, according to the witness, "I expressed the desire for another drink and he said he had some good Scotch so we went to his room." There the parties had a conversation with regard to a certain claim of appellant's with War Assets (R. 108-109). After they had a drink, appellant tendered \$1400 to the witness. He then testified (R. 110):

"Q. And what did you do or say? A. Well I was dissatisfied."

Thereupon appellant gave him another \$100, or \$1500 in all. The significance of this element of the transaction cannot be over-emphasized. Here from Apperson's own lips, despite his supposed mighty striving to occupy a passive, non-entrapment position in the deal, we see him actively protesting the amount tendered and by his conduct insisting upon extracting from appellant a greater sum. Since 18 United States Code Section 201 permits the imposition of a fine three times the amount of the bribe—and such triple fine was actually imposed in this case—we find a situation wherein at the very least a portion of the bribe was affirmatively and exclusively evoked by the witness (and not originally offered by appellant) and wherein such increased bribe could and did have the effect of augmenting the punishment to which appellant has been subjected. Thus *pro tanto* there was an undeniable case of entrapment. If this does not taint the entire scheme to involve

appellant in the commission of bribery, the minimum effect ascribable to it is that it gives considerable color to the contention of entrapment and requires that the entire issue should have been submitted to the jury.

Cross-examination of Apperson accentuated his affirmative actions in causing the removal of the merchandise (R. 159):

“Q. But notwithstanding the fact that he didn’t pay for it you removed it from the warehouse, loaded the truck and put it right on the car, didn’t you? That is a fact? A. I removed it from the warehouse and put it on the railroad car?”

“Q. Without having Mr. Schneider pay for it? A. That is right.”

So it is plain that Apperson’s part in the loading and removal of the goods was not that of a passive observer. Moreover, he made it clear that he accommodated appellant and furnished the labor (R. 154), and that Colonel Chennault had given him a letter permitting him to go ahead and cooperate (R. 164).

When it came to suggesting payment of the alleged bribe, one would expect that in this prosecution the prime mover would be appellant, but Apperson’s testimony establishes that he himself took the initiative at a crucial moment (R. 170):

“Q. Well, did you request Mr. Schneider to pay you right at the bar? A. I suggested that we settle up.

“Q. Right at the bar? A. Yes, I think I did there at the bar.”

So Apperson was not only quite anxious to get the money from appellant, but also would have preferred that the payment be in the presence of witnesses, saying (R. 199):

“At the time in Murrill’s I more or less, well, I delayed, I stayed at Murrill’s as long as we could hoping he would pay off in front of any witnesses that might be there. And we also had a pre-arranged signal that I should drop a handkerchief or napkin when he had

paid off * * * after we left Murrill's Bar and went to the Park Hotel I suggested we have another drink and hoping he would go into the bar and pay me and thereby still having witnesses * * *."

Apperson was therefore concerned not only that the amount of the bribe should be as large as possible, but also that it be handed over quickly and in such a locality as to make the transfer visible to the several prepared witnesses in the establishment.

The cross-examination of Apperson also threw important light upon the inception of the plan—one of the crucial factors in any determination of whether there was an entrapment. Apperson was asked what he did at the beginning of the interview, and he said (R. 204).

"I placed the file with those turn-in slips in front of him."

Appellant's counsel asked whether the witness intended to catch appellant. After some objection, the Court paraphrased the question and obtained an answer thus (R. 204-205):

"The Court: Was this the beginning of the plan or whatever it was? A. Yes, sir. I just put this thing in front of him to see what he would do.

"Q. Well, what was it you put in front of him? A. The file with the turn-in slips in it.

"Q. With what slips? A. These turn-in slips. These 447s we call it.

"Q. What did you do that for? Was it pursuant to a conversation you had with him? A. No, sir, I just told him what I had.

"Q. That is, you mean what salvage or property you had? A. Yes.

"Q. Salvage property? A. Yes.

"Q. Did he say anything about a list or wanting to see a listing or anything of that sort? A. No.

"Q. How did you happen to do it. What suggestion did you surmise? A. I guess just to show him what I had, that is all.

"Q. And in pursuance to some conversations you had had theretofore in regards other purchased property was that in answer to something he talked to you about? A. No, sir, he hadn't mentioned it at all.

"Q. Well, was it pursuant to his visit? I am trying to get at how it happened, what preceded it? A. Nothing. He was just in my office and I just threw this file in front of him to see what he would do to see if he was interested in that stuff.

"Q. Was that the first interview you had with him? A. No, this was the second day.

"Q. This was the second day. Oh, after he made the offer to you? A. Yes."

At this point appellant's counsel resumed cross-examination and elicited the following (R. 206):

"Q. Lieutenant Apperson, that was after the arrangement was made with Mr. Matthews? A. That is right.

"Q. And that was pursuant to a plan that was the way you would start the thing off? A. It wasn't any plan exactly. It was just an idea I had.

"Q. That was the idea you had? A. Yes.

"Q. Now, that list that you showed him that contained all these goods that really weren't for sale, were they? A. They would have been available.

"Q. But they weren't for sale then? A. No, not that minute.

"Q. You couldn't have sold them to him if you wanted to? A. I explained that to him that I could not.

"Q. But nevertheless you threw the thing at him? A. Yes.

"Q. And the purpose was obviously to follow the plan you pre-conceived in arrangements with Mr. Matthews? A. I would say so, yes."

With due allowance for the abortive discussion of the day before, we submit that the two passages last quoted tend strongly to support the defense of entrapment. The whole theory of entrapment turns upon intention and the state of mind of each respective party, and Apperson, notwith-

standing his being a government witness and the admittedly explicit instructions he had received, could not help but disclose *se invito* an attitude of affirmative instigation and shrewd enticement.

Accordingly, if the plan to give and accept a gratuity is scanned from its genesis to its consummation, we find that Apperson, guided by his mentors, was far from passive; that he was not merely receptive; but that he was actually the driving force in virtually every phase. An impartial view of the evidence cogently suggests that the undisputed proof showed entrapment as matter of law, and, without prejudice to that contention, the least to which appellant was entitled was to have the jury pass on the question under appropriate instructions.

The whole subject of entrapment is thoroughly discussed in *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, where Mr. Chief Justice Hughes wrote:

“The Federal courts have generally approved the statement of Circuit Judge Sanborn in the leading case of *Butts v. United States* (C. C. A. 8th) 18 A. L. R. 143, 273 Fed. 38, *supra*, as follows: ‘The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.’ The judgment in that case was reversed because of the ‘fatal error’ of the trial court in refusing to instruct the jury to that effect.”

The Court also quoted with approval the opinion of Woods, Circ. J., in *Newman v. United States* (C. C. A. 4, 1924), 299 F. 131:

“It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”

The Supreme Court concluded:

“The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.”

In the same case Mr. Justice Roberts wrote a separate concurring opinion, in which Mr. Justice Brandeis and Mr. Justice Stone agree, saying:

“There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrapment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require.”

We anticipate that in answer to our contention the government will urge that the idea originated with appellant, but we submit that even on the present record the proof

indicates in the first place that the conversation of the preceding day had concluded that particular matter and that the events of November 23rd were wholly the product of Apperson's plan with the government's agents. In either case the issue was surely one for jury consideration if not determination by the Court.

That a defendant at some prior stage made overtures towards a government official looking towards the possible commission of a crime does not necessarily eliminate the defense of entrapment. In *Sam Yick v. United States* (C. C. A. 9, 1917), 240 F. 60, the inspector testified:

"On the way out he asked me what salary I was getting and whether I had a family to support, and if I could save money off the salary I was getting, and if I had any opportunity to make money on the side, and how much money I made on the side; but I answered, rather shortly, I didn't consider it any of his business, and for the time being the subject was dropped. Then I went out there and examined this man, and on the way back he brought up the matter again, and he asked me if I didn't want to make more money than I was making, and I asked him how he meant."

The officer reported this conversation to the Assistant United States Attorney, who instructed him "to go ahead and try to apprehend him by going in with him." In reversing the conviction, this Court cited its own previous holding, saying (by Ross, Cite., J.):

"In the recent case of *Woo Wai v. U. S.* (C. C. A. 9, 1915) 223 F. 412, we distinctly adjudged that it is against public policy to sustain a conviction for crime where the party or parties are induced to commit by officers of the government who thereafter ensnare and apprehend them in such commission."

A helpful compilation of related cases is contained in the note to *O'Brien v. United States* (C. C. A. 7, 1931), 51 F. 2d 674.

A holding which closely resembles the instant case on the facts is one cited with approval in *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413, namely, *United States v. Lynch* (D. C. N. Y. 1918), 256 F. 983, the opinion in which consists of the charge of the Court. Hough, D. J., wrote:

“A man who expected to be an officer in the United States Army, and had a very good reason to believe that he would soon be commissioned, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, ‘nothing,’ because he was about to become an officer; and there the matter dropped on that occasion.”

Later, at the instigation or by the order—and the Court said it made no difference which—of government officers comprising the Department of Military Intelligence, the offeree told defendant that he had reconsidered the question and in effect asked for the money. The Court held that this constituted “provoking and creating a crime”, saying further:

“Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he was indicted, and seized and swallowed the bait that was laid for him.”

On the foregoing facts the Court held that the prosecution was “an endeavor to punish a crime which would never have been committed if it had not been for the request of the government officer”, and thereupon peremptorily advised the jury to acquit the defendant.

CONCLUSION

For all of the foregoing reasons the judgment of conviction appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Appellant.

LOUIS M. LEIBOWITZ,
of Counsel.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

MEYER SCHNEIDER,
Defendant.

No. 8088

Defendant's Request for Instructions

COMES NOW MEYER SCHNEIDER, the defendant above named, and respectfully requests this honorable Court to give to the Jury Instructions numbered 1 to 5, inclusive, submitted herewith.

H. R. EICKEMEYER,
LOUIS M. LEIBOWITZ,
J. F. ENRIGHT,
Attorneys for Defendant.

INSTRUCTION No. 1

You are instructed that a presumption is a deduction which the law expressly directs to be made from particular facts, such is the presumption of innocence in this case which arises from the facts that the Government has charged the defendant with the commission of the offenses alleged in the Indictment; and the defendant has pleaded not guilty thereto. Such a presumption may be controverted or overcome by other evidence, but unless so controverted or overcome, the jury are bound to find in accordance with the presumption.

Founded on Section 10602-10604 RCM 1935.

INSTRUCTION No. 2

PRESUMPTION OF INNOCENCE

You are instructed that in every prosecution for a crime or public offense, the defendant is presumed to be innocent.

You are further instructed that such presumption is not an idle presumption but has the force and effect of evidence and abides with the defendant throughout the trial of the case and during your deliberation and entitles the defendant to an acquittal unless and until, after due deliberation, you find unanimously that such presumption has been overcome by the Government's evidence and that the Government has established the guilt of the defendant beyond a reasonable doubt.

INSTRUCTION No. 3

ENTRAPMENT

If you are satisfied that prior to the commission of the acts alleged to constitute the crime, the crimes charged, or either thereof, if you find such acts were committed, that the defendant never conceived any intention of com-

mitting these offenses or similar offenses, but that the officers of the Government incited and by suasion and representations lured him to commit one or more of the offenses alleged in order to entrap, arrest and prosecute him therefor, then these facts are fatal to the prosecution and the defendant is entitled to a verdict of not guilty.

Capuano v. U. S., 9 F. 2nd 41.

INSTRUCTION No. 4

BIAS OR PREJUDICE OF WITNESS

I charge you, Ladies and Gentlemen of the Jury, that if any witness for the Government in this case, has shown bias or prejudice against this defendant, and satisfies you that he has not testified truthfully in this case, you may disregard his testimony altogether, and if the guilt of this defendant depends upon such testimony, then find the defendant, not guilty.

Pinkerton v. U. S., 145 F. 2d 252.

INSTRUCTION No. 5

FAILURE OF DEFENDANT TO TESTIFY

The failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him; the Jury is charged that it must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact enter into the discussion or deliberation of the Jury in any manner.

Bruno v. U. S., 308 U. S. 287, 84 L. Ed. 257.

IN THE

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MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

JOHN B. TANSIL,

United States Attorney,
Great Falls, Montana;

EMMETT C. ANGLAND,

Assistant United States Attorney,
Great Falls, Montana.

Attorneys for Appellee.

Filed....., 1950.

....., Clerk



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No. 12501

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

THE RECORD

The record in this case has not been prepared in accordance with the Rules of Procedure. The Federal Rules of Criminal Procedure provide that the rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in the Rules of Criminal Procedure. (Rule 39(b)(1)).

It is to be noted that the appellant has not complied with Rule 75(a) of the Rules of Civil Procedure. That Rule provides:

“(a) Designation of Contents of Record on Appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the

record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant."

There has been no designation of the record on appeal either served upon the appellee or filed with the District Court. This affirmatively appears from the Transcript of Record herein. The appellant did file a statement of points apparently in an attempt to comply with the provisions of Rule 75(d). This designation of points was not served upon appellee. It, of course, would have been unnecessary to serve and file a concise statement of the points on which the appellant intended to rely if he had served and filed a designation of the portions of the record to be contained in the record on appeal and designated the whole record. We find now, in his brief, appellant asks this Court to supplement the record that has been printed herein.

In appellant's brief, the statement is made "Appellant's requests to charge, omitted from the record through inadvertence, are appended hereto". (Br. 3). Beginning at Page 45 is the appendix referred to.

We submit that this Court should not permit appellant to supplement the record in this case by appending a portion of the record to his brief. We cannot concur in the statement that the omission was through inadvertence. The omission resulted solely from the appellant's failure to comply with the Federal Rules of Civil Procedure.

STATEMENT OF FACT

The statement of fact contained in appellant's brief appears to be inadequate. Hence, this statement.

In the month of August, 1948, there was a surplus of scrap material at the Great Falls Army Airbase (R. 78). Invitations to bid on this scrap material were mailed to prospective bidders in the months of August and September of 1948 (R. 78).

Harvey B. Apperson, First Lieutenant, United States Air Force (R. 59), in the performance of his duties, and in conjunction with the purchasing and contracting officer, mailed out the invitations to bid (R. 78). The appellant here, Meyer Schneider, was the successful bidder on the scrap wool and cotton materials (R. 79-80). Schneider did not immediately come from his place of business in New York City to Great Falls, Montana, to take possession of the material and make payment in accordance with his bid. The contract provided that he was to remove the material from the Base within ten days (R. 82-83). On November 15th, the defendant Schneider had a telephone conversation with Lieutenant Apperson, the Base Salvage Officer, in which it was pointed out that the space being used to store the material purchased by the Defendant Schneider was needed. (R. 82-83). It was arranged during that telephone conversation between Meyer Schneider and Lieutenant Apperson that Meyer Schneider would be in Montana on the 16th or 17th of November, 1948. He did not appear. As a result, Lieutenant Apperson called him long distance and again advised him to come out and remove the material. Otherwise, his contract might be cancelled and the

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deposit made forfeited (R. 83-84). The defendant stated he would come to Great Falls, Montana, on November 22, 1948. On the morning of November 22, 1948, the defendant was in Great Falls, Montana, and a meeting was arranged for 10:00 or 10:30 A. M. that day at the Airbase (R. 84-85).

At about 10:00 A. M., Sergeant Raymond P. Aulgur, the non-commissioned officer in charge of the Base Salvage Office, met the defendant at the main gate of the Airbase pursuant to instructions given him by Lieutenant Apperson (R. 218-219).

When the two arrived at the Base Salvage Office, there were piles of surplus clothing apparent. (R. 219 and Record 85-86). At this point, it became apparent that Schneider intended to do more than pick up the scrap material on which he had been the successful bidder. Before the arrival of Lieutenant Apperson at the Base Salvage Office, he had a conversation with Sergeant Aulgur and suggested the possibility of the Sergeant profiting by "a deal between the two of us." (R. 221).

It becomes necessary to call attention briefly to the duties assigned to Lieutenant Apperson as Base Salvage Officer. (R. 340, 140-142).

The testimony of Major C. E. Redding, Adjutant General of the Base, was that Lieutenant Apperson was Base Salvage Officer from August, 1948, until February, 1949, and specifically was Base Salvage Officer on November 22 and 23, 1948, the dates referred to in the indictment. (R. 146-147). Some of the duties assigned to Lieutenant Apperson appear from excerpts of "Exhibit 1" read into the record. (R. 70-77). He was to act for

the Commanding Officer on all salvage activities at the Base. He was not accountable for property turned in for salvage but was responsible for the proper storage and disposition of salvage turned over to him. (R. 70). He was required to protect the interests of the Government and to prevent errors, fraud or theft (R. 76).

To get back to the events at the Great Falls Airbase on November 22. Lieutenant Apperson came into the Salvage Office at about the time that the improper proposals were being made by the defendant to Sergeant Aulgur. (R. 221). This was at about 10:30 A. M. (R. 85). The defendant walked into the back part of the warehouse with Lieutenant Apperson and inquired about merchandise other than that already purchased by him. The defendant next proposed that he and the Lieutenant get together and trade, or substitute, some of the salvage material for the scrap that had been purchased by the defendant. He informed Lieutenant Apperson that he would give him half a quid to a couple of Gs and said he had the money right there, slapping his brief case to indicate the presence of the money to take care of the Lieutenant (R. 88). Schneider informed Lieutenant Apperson that there was money to be made in this sort of business and in the fashion proposed by him. (R. 89). He demonstrated a knowledge of the operations of the Quartermaster and informed Lieutenant Apperson concerning his operations at other bases (R. 90). Lieutenant Apperson did not accede to any of the proposals made but was non-committal. (R. 90). The defendant was shown the merchandise he had purchased (R. 89) and at about 11:15 or 11:30 A. M. left the Airbase (R. 90).

An appointment was arranged for the following day at about 2:00 o'clock in the afternoon. (R. 93).

The following day, November 23, Lieutenant Apperson met the defendant at the main gate of the Airbase and drove him to the Salvage Office. The Lieutenant placed a jacket file in front of Schneider containing a list of useful salvage items that were in storage at the Airbase at that time. (R. 94). Schneider opened it and the Lieutenant pointed to the cost of the salvage to the Government, (R. 94), which sum was upwards of \$36,000.00. (R. 104). When this material was sold, it brought in to the Government \$8,000.00. (R. 148-149). Arrangements were made for the employment of Army personnel to be paid by Schneider, to load material which the defendant had legitimately purchased. (R. 95-96).

Lieutenant Apperson and Schenider went to a warehouse on the Airbase, Warehouse Number 1045. This warehouse contained a large amount of salvage clothing and none of the scrap legitimately purchased (R. 96). The defendant directed the loading of this material on a truck and then from the truck on to a freight car (R. 96-97). The quantity was stated to be almost a warehouse full. (R. 97). The defendant kept note of what was taken from Warehouse Number 1045 and loaded into the freight car at the Airbase (R. 98-100). When that warehouse was practically empty (R. 103-104), the defendant, in company with Lieutenant Apperson, supervised some of the loading of the scrap material that Schneider had contracted to purchase from the Government. (R. 104-107). It is to be remembered that the items contained in Warehouse Number 1045

were salvage items as distinguished from scrap material, and that no purchase of the salvage material in Warehouse 1045 had been made.

Thereafter, Schneider and Lieutenant Apperson left the Airbase and came into the City of Great Falls. (R. 106-107). They first entered a bar and had a couple of drinks (R. 107). They then went to Schneider's room at the Park Hotel in Great Falls, Montana (R. 108). After some discussion about paying off, the defendant stated "I will give you \$1400.00." The Lieutenant did not say anything but indicated dissatisfaction. Whereupon Schneider counted out \$1500.00 and gave it to the Lieutenant (R. 110-111). The Lieutenant requested an envelope in which to place the \$1500.00, which consisted of fifty twenty dollar bills and fifty ten dollar bills. He was furnished an envelope having the defendant's letter-head on it. (R. 110-112). Lieutenant Apperson left the room at the Park Hotel within a very few minutes. Before leaving, Schneider told him that he hoped this was not the last deal they would have and told him that if he ran into anything that might be of interest to not hesitate to call him collect at his New York residence (R. 111-112). Just as soon as the Lieutenant arrived in the Lobby of the Park Hotel, he handed the envelope containing the \$1500.00 to Federal Bureau of Investigation Agents (R. 112-113), who had been advised of the defendant's conduct on November 22, 1948, and who had so far as possible kept in touch with the events that occurred on November 23, 1948. The agents went to Room 340 at the Park Hotel and placed Schneider under arrest (R. 258).

An indictment was returned charging in two counts a violation of the provisions of Section 201, Title 18, United States Code. The first count charged that on or about the 22nd day of November, 1948, the defendant promised a bribe, and the second count charged the giving of a bribe on or about November 23, 1948.

SUFFICIENCY OF INDICTMENT

The contention is made in Appellant's brief that doubt is cast upon the indictment by reason of the fact that the caption of the first count of the indictment cites Section 201, Title 18 U. S. C. "Offer of Bribe"; and that the charge contained in Count 1 charges a promise of a bribe. It is clear that the contention that this is error or ground for dismissal of the indictment is without merit. Rule 7(c) of the Rules of Criminal Procedure provides that an indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provisions of law which the defendant is alleged therein to have violated. The rule provides further:

"Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

A review of the record in this case will readily demonstrate that the error did not mislead appellant to his prejudice.

The appellant relies upon the case of *Blunden, et al. v. United States*, 169 F. (2d) 991 to contend that the indictment in this case is insufficient as a matter of law. It appears from what is stated about the information in that case that the charge was not as complete as the

charge made in this case. In the Blunden case, the information did not charge the appellants with the intent to influence to commit a fraud on the United States or to make opportunity for the committing of a fraud, yet, as pointed out by the Court, those additional offenses are included within the terms of Section 201 of Title 18, U. S. C.

The contentions made by the appellant that the indictment in this case is insufficient as a matter of law overlook entirely the Rules of Criminal Procedure. The indictment in this case is sufficient and we believe what was said by this Court in *United States v. Bickford*, 168 F. (2d) 26 is particularly applicable. The District Judge in that case held the indictment fatally defective because it did not aver that the Clerk of the Court had competent authority to administer an oath to Bickford who was charged by indictment with perjury. The Court stated:

“The criminal rules were designed to simplify existing procedure and to eliminate outmoded technicalities of centuries gone by. Certainly Rule 7(c) was not intended to be less liberal than is the modern practice of the federal courts to consider the adequacy of indictments on the basis of practical as opposed to technical considerations. It has long been settled in the federal jurisdiction that an indictment is good if (1) it states facts sufficient to inform the defendant of the offense with which he is charged, and (2) if its averments be sufficiently certain to safeguard the accused from a second prosecution for the same act. *Hagner v. United States* 285 U. S. 427, 52 Ct. 417, 76 L. Ed. 861; *Berger v. United States* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314; *Hopper v. United States*, 9 Cir., 142 F. 2d 181. As observed in *Hagner v. United States*, supra, at page 433 of 285 U. S., at page 420 of 52 S. Ct., ‘It is enough that the necessary facts

appear in any form, or by fair construction can be found within the terms of the indictment. Measured by these standards, the sufficiency of the indictment before us is not open to debate."

Mention is made in appellant's brief of the fact that the two counts of the indictment relate but to a single transaction. Any contention that it is improper to allege the offenses here in two counts cannot be sustained as stated by the court in

United States v. Michelson,
165 F. (2d) 732.

"We think that Congress, as it lawfully may, provided that to 'offer' a bribe and to 'give' a bribe are two distinct crimes even when parts of a single transaction, since the one (to 'give') involves an element which the other (to 'offer') does not. The test, as stated in *Morgan v. Devine*, 237 U. S., 632, 640, 35 S. Ct. 712, 714, 59 L. Ed. 1153, is "whether separate acts have been committed with the requisite criminal intent."~~xxxx~~

This court fully discussed a contention of this kind in the case of

Catrino v. United States
176 F. (2d) 884

The foregoing decisions are particularly applicable to this case as the promise to give a bribe was made on November 22, 1948, and on the following day, November 23, 1948, the bribe of \$1,500.00 was paid.

It is submitted that the counts of the indictment herein conform to the decisions of this Court on the sufficiency of the indictment under the new Rules of Criminal Procedure.

ON THE PROPOSITION THAT THE GOVERNMENT FAILED TO PROVE THE COMMISSION OF A CRIME WITHIN THE SCOPE OF THE STATUTE AND FAILED TO PROVE THAT LIEUTENANT APPERSON HAD ANY AUTHORITY OR OFFICIAL DUTY IN CONNECTION WITH THE SALE OR DISPOSITION OF GOVERNMENT SURPLUS PROPERTY.

The appellant, under Point 2 in his brief, submits the proposition to this Court. He would have this Court believe that there was no matter pending before Apperson for official action and that there was no unlawful act or violation of duty induced by the appellant. He quotes evidence from the record in this case in an attempt to establish a lack of authority vested in Lieutenant Apperson to negotiate a sale of the merchandise taken from Warehouse 1045 by appellant. It is to be noted that the statute prohibits a fraud or the making of an opportunity for the commission of a fraud on the United States and further prohibits the inducing to do or omit to do an act in violation of lawful duty.

The indictment in this case is drawn in accordance with the statute and does incorporate in both counts an allegation that the defendant acted as he did with the intent to influence Lieutenant Apperson to allow and make opportunity for the commission of a fraud on the United States, and to do an act in violation of his lawful duty.

The record does not contain, in its entirety, plaintiff's Exhibit Number 1, the United States Air Force Regulations governing the duties of Base Salvage Officer (R. 70). The portions of plaintiff's Exhibit Number 1 read to the jury are included in the record (R. 70-77). At

the outset, the regulations governing Lieutenant Apperson as Base Salvage Officer provide:

"The salvage officer acts for the Commanding Officer on all salvage activities at his installation. He is *not accountable* for property turned in for salvage but *is responsible at all times for the proper storage and the disposition of salvage turned over to him.* The salvage officer will exercise strict supervision over all transactions and will use due caution and diligence to *prevent irregularities or opportunities for fraud and/or collusion.*" (Italics supplied). (R. 70).

We call particular attention to the fact that the salvage officer is not accountable for property turned in for salvage (R. 70).

It appears further from the regulations that the Base Salvage Officer could dispose of property other than by sale (R. 72).

Under certain circumstances, spot negotiated sales could be made. The regulations provide:

" 'Spot negotiated sales' and contracts will be processed as follows: (1) The Base Salvage Officer will: (a) Obtain written authorization from the area salvage officer to conduct the sale by the spot negotiation sales method. Requests will contain a complete statement of all facts relevant to the proposed sale and a statement showing that the Government will obtain a more definite tangible benefit by use of the spot negotiation method of sale than would be obtained through competitive bidding by use of DA AGO Form 1025." (R. 75).

We submit that the opportunity is contained in the foregoing paragraph for the Base Salvage Officer to obtain, through deceit and deception, authorization to conduct a spot negotiated sale. We do not believe, as is apparently contended by appellant, that in order to sus-

tain a conviction in this case it would be necessary to show that the Lieutenant must have had authority to legally conduct a spot negotiated sale. When one has been bribed to do an act, the action taken in accordance with the bribe is, of course, not legal action. This is the fallacy in the argument submitted to this Court by appellant.

We find further that the regulations applicable provide that the Base Salvage Officer is to protect the interests of the Government and *to prevent errors, fraud or theft*, (R. 76), and that the Base Salvage Officer is required to maintain records. (R. 77).

The appellant in this case did propose that the records required of Lieutenant Apperson could be covered to deceive the Quartermaster of the Army if Lieutenant Apperson would accede to the proposal of the appellant.

“A. Well on the way up there to that coffee shop he said that a deal like that would be easy enough to cover. He acted that he knew all about how records were kept and had quite a knowledge of the Quartermaster operations and said a deal like that would be easy enough to cover.” (R. 90).

That certainly is a proposal to perpetrate a fraud upon the Government.

On November 22, the date on which the promise to give a bribe was made and the basis for the first count in the indictment, the appellant proposed that Lieutenant Apperson substitute useful items, i. e., salvage, for the scrap material that had been legitimately purchased by the appellant.

“A. Yes, he wanted to get together with me or trade some of the scrap that he had legitimately purchased; he wanted me to substitute some of the useful items for this scrap, and he went on to say that he

would take any amount and that he would give me, said he would give me half a quid to a couple Gs, and he further said 'I have got the money right here' and slapped his brief case to indicate he had a couple Gs to take care of me." (R. 88).

That proposal, we submit, is in violation of the duties assigned by the regulations to the Base Salvage Officer, Lieutenant Apperson in this case.

The appellant's contention that the offense can only be committed if a bribe was offered or paid to induce Lieutenant Apperson to do an act in accordance with every legal requirement cannot be sustained. See *Daniels v. United States*, 17 F. (2d) 339.

In addition to the authority outlined in plaintiff's Exhibit Number 1, Lieutenant Apperson testified that he had authority to ship the salvage material after it had been loaded in the freight car.

"Q. Lieutenant Apperson, did you have the right or the authority after the stuff was in the car to send it off to Mr. Schneider?

A. Yes, I could have sent it off to him.

Q. Without violating any rule and regulation?

A. No.

Q. Without having been—

A. I wouldn't have sent the good stuff to him, no.

Q. Of course you wouldn't. I just asked you if you had the right to send that stuff through without any permission from anybody to Mr. Schneider in the very form that it was put on and the very manner that it was put on?

A. Yes, I could have sent it to him.

Q. Without getting paid for the merchandise?

A. Well, I had better explain a little. I am re-

sponsible for that equipment. If I had sent it to Mr. Schneider, I would have had to pay for it myself. (176).

Q. You would be responsible to whom?

A. To the United States Government.

Q. You mean a financial responsibility only?

A. That is right.

Q. And that is the only responsibility?

A. That is right.

Q. As long as you paid for the merchandise you would have been absolved from any responsibility?

A. I would have had to pay for the amount it cost the Government. That is what we call pecuniary liability.

Q. You would have to pay the \$36,000?

A. I presume so.

Q. And that is all?

A. I presume so." (Record 189-190).

Lieutenant Apperson could properly expand on the authority conferred upon him by the regulations. He could testify concerning his duties.

Sabbatino, et al. v. United States,
298 F. 409.

This Court in the case of *Cohen, et al. v. United States*, 144 F. (2d) 984 at 987 stated:

"(3) To constitute the offense of bribery within the meaning of 18 U. S. C. A. Sec. 207, it is sufficient if the action to be affected by the bribe was a part of any established procedure consistent with the authority of a governmental agency."

The evidence in the present case was sufficient to come within the foregoing.

The appellant submits that on the authority of *Blunden*

v. United States (C. C. A. 6, 1948) 169 F. (2d) 991, that this prosecution must fail. There is much said in that decision to sustain the conviction in this case.

"The construction of the applicable statute, Sec. 91, now Sec. 201, Title 18 U. S. C. A., seems well settled in this jurisdiction. In *United States v. Birdsall*, 233 U. S. 223, 34 S. Ct. 512, 58 L. Ed. 930, the Court held that every action of a person acting on behalf of the United States that is within the range of his official duty comes within the purview of the section; that to constitute it official action, it is not necessary that it be prescribed by statute, but it is sufficient that it be governed by a lawful requirement of the department under whose authority the officer is acting; and that it is not necessary that the requirement should be prescribed by a written rule or regulation. In *Rembrandt v. United States*, 6 Cir., 281 F. 122, this Court held that the statute refers not merely to influencing a decision on any question, but also to influencing action on any matter, and that the statute was applicable to a situation where the advice and recommendation of the Government employee involved would be influential in securing the decision desired by the persons offering the bribe, even though the employee did not have the authority to make the final ruling."

The foregoing statement is in direct contradiction to appellant's contentions. The Court, in that case, pointed out that the charge made was not as broad as it might have been.

"A careful reading of the information shows that it did not charge the appellants with the intent to influence Flisek to commit a fraud on the United States or to make the opportunity for the commission of such a fraud, although such additional offense is included within the terms of the statute."

In the present indictment the charge is broad and does include the allegations of fraud and opportunity for the commission of a fraud on the United States.

ON THE QUESTION OF IMPROPER REFERENCES TO OTHER OFFENSES AND THE EVIDENCE OF THE WITNESS WALKER REGARDING TELEPHONE CONVERSATIONS WITH APPELLANT.

The appellant has submitted that this case should be reversed because of improper references made to other offenses supposedly committed by the appellant and because the court permitted the Witness Walker to testify concerning telephone conversations had with the appellant.

In his argument on Point 3, appellant quotes from the opening statement of the prosecution and the reference made to a conversation with Lieutenant Apperson, which it was expected would be testified to. Both the court and counsel, as stated by the appellant, (Br. 23), advised the jury to disregard anything that was not testified to by witnesses during the trial. The Court particularly pointed out that the jury would be warned in the instructions concerning any statement of that kind. (R. 51-52). We find no request by appellant to instruct on this phase of the case.

Lieutenant Apperson could properly have been permitted to testify to any conversation had with the appellant during the course of his dealing with appellant. The Lieutenant, in his testimony, did not refer again to the matters objected to by the appellant.

“A. We went into the coffee shop and got a cup of coffee and at that time Schneider began to tell me about how he operated at other bases and that he explained to me he operated quite a bit at a large depot down south and very carefully avoided telling me where that depot was. He said that he had dealt quite often through salvage agencies and at that time I think he said something about a cousin or somebody that had

been in the Quartermaster Corps during the war, that wasn't material the conversation at the time. I (69) told him, well, I was very noncommittal, I didn't say one way or another. By that time it was about 11:15 or between 11:30, and I had been Officer of the Day and up the night before and I went into the commercial transportation office where I could get a telephone and call a taxicab for Schneider." (R. 90).

That is as close as Lieutenant Apperson came to supplying the statements made by counsel in the opening address to the jury.

The Court was more than fair with the defense. We believe that statements made by appellant to Apperson about transactions that the appellant may have had at other bases were admissible. We call attention to just how fair to appellant the Trial Judge was:

"MR. LEIBOWITZ: I object to the answer. I object to the question on the ground it is wholly immaterial to the matters in the indictment and which cannot prove any offense in the indictment at all, and it was done after the act of the loading of the merchandise; I think the thing is over.

MR. LAMB: The question, your Honor, was what took place in the building in the salvage yard.

THE COURT: I think any conversation between them that refers some other matter has no connection with this is not relative to this case, this charge here. I will sustain the objection as to that. What is it, something in New Orleans?

MR. LAMB: I agree with you as far as the airplanes is concerned. Much of this evidence of the activities in other Army Depots is being offered for the purpose of showing that (85) the defendant well knew the transactions.

THE COURT: Well you have already shown his familiarity in this business that he is engaged in; he

has dealt with other salvage bases and stations but when it comes to anything that hasn't any bearing on or legal connection and unconnected entirely with this transaction, and Mr. Leibowitz's objection to that is sustained.

MR. LEIBOWITZ: May I have the answer stricken out?

THE COURT: Yes, as far as New Orleans or anything going on down there; was it New Orleans?

A. No, sir, New Mexico.

THE COURT: All right, it will apply to New Mexico." (R. 104-105).

Objection is made to the admission of a statement made by the Witness Aulgur. The appellant quotes a portion of the Witness' answer (Br. 24). The complete answer is as follows:

"A. Mr. Schneider referred to the property laying on the floor and asking if some kind of a deal couldn't be made. I informed him the property had been listed for sale and would be published in the very near future and if he cared to, he could look the property over and I would give him a form showing the property so he could submit a bid (210). And as I started to go after the form he made the remark that he thought I misunderstood him; he meant just a deal between the two of us. I further informed him that the property was up for sale and that nothing could be done; if he wanted to bid on it, that he could. And then I handed him a copy of the list we had made up to submit the property for sale. While I was giving him the list there was some remark made about a lot of money could be made, and approximately that time Lieutenant Apperson came in." (R. 221).

Most certainly, the witness could testify as to any conversation he had with the appellant Meyer Schneider. It was Sergeant Aulgur who met Meyer Schneider at the main gate of the Airbase and drove him to the salvage

office (R. 219-220). Whether this evidence was prejudicial or not is immaterial. It was admissible. It was the first conversation that Meyer Schneider had with anyone at the Airbase with reference to acquiring surplus property. Appellant contends, in his brief, that that evidence tended to show that he made illegal overtures to Sergeant Aulgur. The evidence was admissible and did tend to show that the defendant was interested in acquiring salvage property. Whether he acquired it through a fraudulent transaction with a Sergeant or a Lieutenant made little difference to him. It is one of the steps leading up to and directly related to the overtures immediately thereafter made to Lieutenant Apperson.

The evidence was admissible. The situation is similar to that considered by this Court in the case of *McCoy v. United States*, 169 F. (2d) 776, 783, wherein this Court stated:

"(5, 6). Since a state of mind is difficult to prove precisely, evidence of surrounding circumstances may be admitted to prove intent. *Shreve v. United States*, 9 Cir., 103 F. (2d) 796, 803, and cases cited therein. In *United States v. Uram*, supra, 148 F. (2d) at page 189, the court admitted testimony of a 1938 transaction because it was pertinent to the instant charge in that it ' * * * bore heavily on his intent in the 1939 (instant) transaction. It proved his "knowledge" and threw light on his purpose in the 1939 transaction' (6). Evidence was properly admitted as to McCoy's attempt to induce Lahren to do that which later he succeeded in inducing Browning to do. Lahren's testimony as to advice and aid of McCoy and that McCoy made out applications which Lahren later refused to go on with, was properly admitted. No error was committed in regard to this subheading."

We next consider the testimony of the witness Walker

regarding the telephone conversations had with the appellant. It does not appear to us that any proper objections were made to the evidence if it was objectionable.

The appellant would have this Court believe that the telephone conversations were highly prejudicial and contends that they were irrelevant and immaterial to the issues being tried. The fact is that the telephone conversations testified to by Private Walker were all relevant to the scrap material that had been purchased by the appellant.

The first call, as related by the witness, was to the effect that the appellant wanted to know what the material he had purchased consisted of (R. 211), and that was all there was to it.

The second call, as related by the witness, is to the effect that the appellant wanted to know about any overage. In other words, excess in quantity, and in addition inquired as to whether or not he could be accommodated by way of separating the socks from the other material. (R. 212). There was nothing that could be construed as prejudicial to the appellant in that conversation and when the witness was cross-examined, he certainly testified that nothing improper had been said by the appellant during the conversation (R. 216-217).

In the third telephone conversation testified to by the witness Walker, the only thing the witness stated was that something was said by the appellant about coming out. Apparently, meaning come out to Montana. (R. 214-215). The third call was turned over to Lieutenant Apperson (R. 215). Lieutenant Apperson testified concern-

ing that telephone conversation without objection (R. 82-84).

We find nothing that could possibly be construed as prejudicial to the appellant in the testimony of the witness Walker. Yet, we find a statement in appellant's brief, "It is clear that the purpose of introducing it was to show that appellant was laying the ground work for some ulterior approach. Of course, this was flatly at variance with the theory of defense attempted to be developed on cross-examination of Apperson that appellant came to Montana at the instance and solicitation of Apperson." (Br. 27). The record just does not sustain the statement that there was an attempt to lay the ground work for some ulterior approach. The idea that this testimony was at variance with the theory of the defense attempted to be developed on cross-examination of Lieutenant Apperson that appellant came to Montana at the instance and solicitation of Apperson is an idea that we now find in the brief of appellant and is not an idea that can be found in the record in this case.

As a matter of fact, there could be no variance in this case so far as the defense is concerned. The evidence is all on one side, the Government's case. No evidence whatever was introduced by the defendant, appellant here. As stated by this Court in the case of *McCoy v. United States*, 169 F. (2d) 776, the evidence introduced by the Government stands upon its own intrinsic merit. The Government's case and the evidence presented is undisputed, unexplained and uncontradicted. See *Guerera v. U. S.*, 40 F. (2d) 338; *Affronti v. U. S.*, 145 F. (2d) 3; *McCoy v. U. S.* 169 F. (2d) 776.

We submit that the Court did not err in the particulars suggested by appellant under Point Number 3 and Point Number 4 set out in Appellant's Brief.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S COUNSEL THE RIGHT TO INSPECT THE MEMORANDA OF THE WITNESS MATTHEWS.

John J. Matthews, a Special Agent of the Federal Bureau of Investigation, was called to testify concerning his part in the apprehension of the appellant for the offense with which he is charged by indictment in this case. (R. 244-297).

The statements made in appellant's brief would tend to completely mislead this Court as to the fact. The witness did, at one time, during his direct examination, refer to notes that he had made (R. 272-273). He looked at these notes for the purpose of refreshing his recollection as to a conversation had with the defendant after the defendant had been arrested and arraigned before the United States Commissioner (R. 268). That is the only time that the witness referred to his notations. Only as to that one conversation with the defendant Schneider. During the cross-examination, counsel for the defendant addressed an inquiry to the Court:

"MR. LEIBOWITZ: Would I be permitted to examine those notations, your Honor?

THE COURT: Well I think not, if Mr. Matthews can testify, if he can testify from it.

MR. LEIBOWITZ: Well I would like to make a record here. I want to note my objections to the refusal of the court to permit me to examine the records made by the F. B. I. Agent, Mr. Matthews, to any transactions or negotiations he had with Meyer Schneider or anybody with reference to this case.

THE COURT: Well I will permit him with the notes he can look at the notes to, with reference to any conversation or interview with Meyer Schneider, the defendant. But he has made notes no doubt about many other things in connection with the case that he couldn't testify to and wouldn't be competent evidence at all, and I don't think you have any right to examine notes of that kind. If it was (272) competent evidence here, he probably consulted with the United States Attorney and found out what would be competent evidence and what would be admissible and what would not. Now your wholesale request, of course, will be denied.

MR. LEIBOWITZ: I am only interested in those notes which have to do with his investigation of the case is all.

THE COURT: I am interested in those notes which have to do with competent evidence here in this case. I will overrule your objection.

MR. LEIBOWITZ: I have my exception.

THE COURT: Yes." (R. 280-281).

A few questions following the above, the Court very properly pointed out to counsel that general fishing expeditions were not proper.

"THE COURT: He spoke about notes and conversations with the defendant. Now you are inquiring about something that probably would not be admissible in evidence.

MR. LEIBOWITZ: I want to find out if he has anything there that may contradict him. There may very well be something written down that contradicts what he says.

THE COURT: I don't think you have the right to go (273) on a general fishing expedition of that kind.

MR. LEIBOWITZ: All right, I note my objection and I would like to have my exception, that is all.

THE COURT: It has already been passed on two or three times." (R. 281-282).

All of the Special Agent's records or just *any* notes or records, collateral or remote, concerning "any transactions or negotiations he had with Meyer Schneider or anybody with reference to this case" (R. 280), are not here, as a matter of unqualified right, subject to inspection by the defense for cross-examination purposes. Even if, in a similar case, there were a proper foundation—and there is none at all here—the matter of inspection, and its manner and limits, would necessarily be very largely within the sound discretion of the Court.

Note (R. 280-281) that the Court said that inspection would be permitted "*with reference to any conversation or interview with Meyer Schneider, the defendant.* But he (F. B. I. Agent John J. Matthews) has made notes no doubt about many other things in connection with the case that he couldn't testify to and wouldn't be competent evidence at all, and I don't think you have any right to examine notes of that kind. * * * Now *your wholesale request*, of course, will be denied."

Those portions of the printed record which are quoted immediately above show quite clearly that the Court virtually suggested three times that defense counsel forthwith narrow his request to those precise notes with which Special Agent Matthews had refreshed his recollection on direct examination: or at least that he particularize his request so that the Court, in passing upon it, would know whether a mere memory link, or notes reasonably cognate, were sought to be inspected. No such request was made, despite what are almost invitations by the

Court to do so. The Court was justified beyond dispute in allowing no "fishing expedition" into *all* of Special Agent Matthews' notes.

The appellant cites, as supporting his position, a decision of this Court, *Brownlow v. United States*, 8 F. (2d) 711. The Brownlow case seems to support the Government's case rather than the appellant's. The case, as we read it, holds that opposing counsel may be entitled to inspect a document used by a witness to refresh his recollection. That right has a definite limitation. Opposing counsel is not entitled to inspect the entire document. Opposing counsel may inspect only those parts which are called to the attention of the witness or which relate to the subject on which refreshment of recollection is attempted. We submit that not one case cited by appellant will sustain his position. The rule is stated correctly in *Harper v. United States*, 143 F. (2d) 795, 803:

"(19). It is next contended that the court unduly restricted cross-examination of certain government witnesses. One of the victims, Cecil Clyde Goff, is said by appellants to have testified to a certain date by reference to a memorandum and it is urged that the denial of a request by counsel for defendants to see the memorandum constituted reversible error. The record is very obscure as to what appellants desired to see. Assuming that the record is as contended by appellants that a memorandum was used to fix a date, the error, if any, would seem to be harmless. *Taylor v. United States*, 8 Cir., 19 F. (2d) 813; *Miller v. United States*, 5 Cir., 126 F. (2d) 771."

A situation similar to the one presented in this case was presented in the case of *Little v. United States*, 93 F. (2d) 401, 406:

"(1). It is a generally accepted rule of evidence that

the defendant in a criminal case or his counsel has the right, upon proper request or demand, to inspect and use, for purposes of cross-examination, any paper or memorandum which is used by a witness on direct examination for the purpose of refreshing his present recollection. *Lennon v. United States*, 20 F. (2d) 490, 493 (C. C. A. 8); *Taylor v. United States*, 19 F. (2d) 813, 818 (C. C. A. 8); *Morris v. United States*, 149 F. 123, 126 (C. C. A. 5). It was pointed out by Judge Stone in his concurring opinion in the *Taylor* case, *supra*, that a conviction will not be reversed for a denial of this right if it appears clearly on the record that no prejudice resulted from the error. In that case the memorandum was used by the witness on direct examination for the purpose only of refreshing her recollection as to whether the circumstance to which she testified occurred on the 21st or on the 22nd day of the month; and the exact date being immaterial the denial of the right was held to be without prejudice."

In reading this record, the Court will see that the refusal to allow opposing counsel to see the memorandum which Matthews had made in connection with the case and used solely to refresh his memory on a single question was far from being the circumstance that tipped the scales against Schneider and caused the verdict of guilty.

THE COURT FULLY AND FAIRLY CHARGED THE JURY AND THERE WAS NO EVIDENCE OF ENTRAPMENT TO EITHER SUSTAIN A JUDGMENT OF ACQUITTAL OR TO REQUIRE THE SUBMISSION OF THAT ISSUE TO THE JURY.

The objection is made that the Court charged the jury that the offense could be committed by negligence. Excerpts of the pertinent charge objected to are set forth in appellant's brief (Br. 30-31). The complete statement

including what has been set forth by appellant and what has been omitted is as follows:

“Now, of course, intent, the intent is always an element, necessary ingredient to be established in a case of this kind. This is a felony case and the jury before they can convict the defendant must find here in this case beyond a reasonable doubt a joint operation of act and intent, or what we call in law criminal negligence. Now criminal negligence in that connection means the doing of an act with a reckless disregard of the consequences, not caring particularly what happened. Now you are unable, of course, any of you to look into the mind of the defendant and determine with what intent he acted if you believe that he acted in accordance with the charge contained in this indictment. But in order to determine that intent you must take into account all of the evidence in the case and all of the circumstances that you have observed during the progress of the trial in connection with the case and the facts of the case and sometimes circumstances are very important and afford very important evidence, and that is for you to say because you judge of the facts and the circumstances the same as you do the testimony of the witness from the witness stand. But you remember in that connection you are to recall the presumption that every sane person is presumed to intend the natural and usual consequences of his own deliberate act. However, the court instructs that as heretofore that you must be satisfied beyond a reasonable doubt of his guilt before you can find him guilty; that is, you must be satisfied beyond a reasonable doubt that he acted, that if he acted at all with a criminal, that is to say, with an evil intent to violate the law.” (R. 364-365).

There can be no doubt in this case but that the charge of the Court fully and fairly stated the law applicable to the evidence before the jury. That is what is required in accordance with the rule laid down by this Court in

McCoy v. United States, 169 F. (2d) 776, 784-786, and in *DePratu v. United States*, 171 F. (2d) 75, 77.

We have heretofore called the attention of the court to the fact that defendant's requested instructions should not properly be considered as a part of the record on appeal in this case.

The requested instructions which were refused are urged upon this Court only insofar as they relate to entrapment. The rule on entrapment is:

"One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of 'entrapment.' Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent." 22 C. J. S. Sec. 45, Page 99.

There just wasn't any evidence on entrapment. The idea for perpetrating a fraud upon the Government by obtaining salvage material from the Airbase at Great Falls, Montana, did not originate with Lieutenant Apperson. That idea originated with the appellant. The appellant cannot even through a strained analysis of the evidence in this case sustain the contention that entrapment existed.

On November 22nd, the suggestions and proposals originated with the appellant (R. 86-90).

When Schneider arrived at the Salvage Office on November 23rd, Apperson made no suggestions to Schneider. He testified upon cross-examination (R. 204):

"A. I placed the file with those turn-in slips in front of him.

A. Yes, sir. I just put this thing in front of him to see what he would do."

From there on, Schneider proceeded to obtain possession of the salvage material described in the turn-in slips referred to. Lieutenant Apperson acceded to his request. The plan of bribing Apperson originated with the appellant and the Lieutenant merely gave Schneider an opportunity to carry out the scheme that he had in mind. That is not entrapment.

Patton, et al., v. United States,
42 Fed. (2d) 68.

Buckley v. United States,
33 F. (2d) 713.

In the last mentioned case, the Court stated at Page 718:

"It is plain that, if the making of any offer of bribe by Buckley was induced or brought about by Eckhart, the defense of entrapment would have merit; and equally plain that, if Buckley first made the offer, without any inducement by Eckhart, then all the things which Eckhart afterwards did, in assuming to go along and in providing the way for Buckley to send incriminating telegrams and make incriminating admissions which would be overheard, were legitimate effort to get evidence which would tend to prove the crime which had already been committed."

We subscribe to the quotation in appellant's brief (Br. 40) taken from the decision of the court in *Sorrells v. United States*, 287 U. S. 435, 77 L. Ed. 413.

The evidence in the present case does not tend to prove nor indicate in any way that there was an endeavor to cause or to create crime in order to punish it. There was no violation of public policy in this case. Public policy in this case would demand that Lieutenant Apperson do

just exactly what he did do. The idea of bribery originated in thought and in deed with the appellant.

The appellant cites, in support of his case, two decisions of this Court:

Sam Yick v. United States,
240 F. 60;

Woo Wai v. United States,
223 F. 412.

Neither of the foregoing cases support the idea that there was entrapment in this case. The court in those cases was concerned with officers of the law having incited the party to commit the crime charged and lured him on to its consummation. There was no luring of Schneider. Schneider arrived in Great Falls, Montana, and went to the Great Falls Airbase prepared to obtain property other than that which he had purchased from the Government legitimately. His first contact at the Airbase was with Sergeant Aulgur and he immediately suggested the possibility of making a deal with the Sergeant. (R. 221). The record is clear that when he found he would be required to deal with Lieutenant Apperson rather than the Sergeant, his whole program was to obtain the property by fraud. Public policy rather than frowning on the conduct of Lieutenant Apperson in going along with Schneider so that he might be apprehended would demand that Lieutenant Apperson do what he did do to prevent

frauds upon the Government and apprehend he who would promise a bribe and give a bribe.

The judgment should be affirmed.

Respectfully submitted,

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H 12501

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

FILED

APPELLANT'S REPLY BRIEF

In the present brief we shall attempt concisely to reply to the several arguments made by the Government.

At the outset, appellee (pp. 1-2) takes exception to the form of the record as not being in conformity with the rules. Our original intention was to print the entire record, but the requests to charge were unfortunately not available at the time of printing, with the result that they were not included. When they finally came to hand, it was decided to append them to the brief in order that the Court might properly refer to them. Inasmuch as they relate solely to points of law and do not impinge upon controverted factual issues, appellee could in no manner be prejudiced by their presentation as part of our original brief, and we are surprised that the matter has been made the occasion for any comment whatsoever.

The Government's position with regard to the duties of Lieutenant Apperson (p. 4) presently appears to be that they may be enlarged by the testimony of Major Redding (R. 140-142). Elsewhere the lieutenant's duties are purportedly described in Government's Exhibit 7 (R. 141, 340), which was the special order giving him, among other things "primary duty as salvage and property disposal officer."

This, as we have pointed out in our main brief (p. 20) was not the same thing as "Air Force and Base Salvage Officer," the designation employed in the indictment (R. 2-3). The Government tried further to fortify its position by reading into the record certain excerpts from Exhibit 1, a 700-page manual (R. 70-77). Incidentally, in relying on this manual, we submit that appellee has misstated the language of the record when it declares (p. 5), "He was required to protect the interests of the Government and to prevent errors, fraud or theft." A reference to the record itself and to the very page referred to in support of the above assertion (R. 76) discloses that the passage in question, as read by the United States Attorney, was:

"And under the paragraph, page 584, marked 'Weight, Count and Inspection': 'To protect the interests of the Government and to prevent errors, fraud, or theft, all salvage property sold will be inspected by the salvage officer or his representative at the time of delivery or shipment to purchasers. Salvage officers will be on the alert to prevent dishonest practices in weighing property. Scales will be periodically examined'."

In other words, the regulations included an inspection requirement whose declared purpose was to protect the Government's interests and to prevent errors, fraud or theft, and appellee has seized upon this language and extended it so as to make such protection and prevention a general duty of the salvage officer.

In the same connection we submit that the testimony of Major Redding should not have been received at all for the purpose of enlarging the alleged duties of Lieutenant Apperson, and objection and exception were duly taken to attempts directed to this end (R. 146-147). If there had been no special order at all, the testimony might conceivably have been pertinent, but since the duties were defined or specified in the special order, that should have been conclusive. Appellee should not be permitted to sustain a vital deficiency in its proof by reliance on evidence that

is not competent. This is particularly so since the Government in the first instance offered the document itself as evidence of the duties it sought to impute.

As to the sufficiency of the indictment, appellee (p. 8) minimizes the caption of the first count ("Offer of Bribe") as an inconsequential and unprejudicial mistake. In the case at bar this was not a trivial matter, for defendant himself was understandably misled. The Trial Court was evidently confused and used the words "offer" and "promise" interchangeably. With the Court evidently regarding both concepts as identical, it is natural that defendant, too, should have difficulty in defending himself against a charge that was ambiguous at best.

Appellee misapprehends our purpose in citing *Blunden v. United States*, 169 F. 2d 991. The case turned entirely upon the information's failure to allege that the officer involved had the authority and jurisdiction to act in the matter, a feature declared to be "the essential element of the offense". Yet appellee makes the irrelevant observation that the *Blunden* information omitted to charge the commission of a fraud against the United States; indeed, in every case the effect of improperly influencing the decision or action is to commit a fraud against the United States or give opportunity therefor, for without such fraud or opportunity there can be no offense.

Although we cited in our main brief (pp. 5-6), *United States v. Kemler*, 44 F. Supp. 649, for our contention that both offering and promising are not synonymous inasmuch as the statute differentiates between them, and the further proposition that an indictment is defective which fails to allege that the person acting in an official capacity was being bribed in connection with his line of duty, appellee fails to answer this argument but relies on *United States v. Bickford*, 168 F. 2d 26, involving the authority of the clerk of a court to administer an oath, the indictment being for perjury. Needless to say, a court can always take judicial notice of such power, and the situation is not even comparable to that of a base salvage officer, concerning

whose duties no court or lawyer could venture more than a conjecture in the absence of specific evidence on the subject. *Catrino v. United States*, 176 F. 2d 884 (cited by appellee, p. 10), dealt with two separate statutes, to wit, subornation of perjury and obstruction of justice, and it was held that each separate step in a prohibited transaction might constitute a distinct criminal offense.

We urged originally (pp. 20-21) that the record is devoid of proof showing that Lieutenant Apperson could have ordered the removal of merchandise from warehouse 1045 or for that matter from any other place without complete compliance with the public sale and competitive bidding routine; that his authority to make spot sales was limited to scrap lumber; and that according to his own testimony he could not inaugurate a proceeding for the disposition of property without the prior approval and cooperation of Lieutenant Greene. From the circumstances surrounding these limitations on his authority we argued that there was actually nothing for him to decide and no action to be taken by him. In this connection appellee does not argue that the merchandise legitimately purchased by appellant was not fully paid for in accordance with all the requirements of law and in pursuance of the agreement which had been entered into; in fact, the record abundantly establishes full payment and conformity. Appellee argues that the statute prohibits the commission of a fraud and also prohibits the inducing to do or omit to do an act in violation of lawful duty. However, the important thing to remember is that the influencing and the fraud must concur; the unlawful inducing must tend to the commission of a fraud on the United States; if the two factors do not coexist, then there is no bribery within the meaning of the statute. We submit that the Government strains its argument in having to establish that there was an influencing with respect to an actual duty and reiterates (p. 13), even italicizing the contention, that the Base Salvage Officer was required by the regulations to protect the interests of the Government and to prevent errors, fraud or theft. We have already

shown, *supra*, that this argument is predicated upon a garbling of the language of the record and the pertinent regulation. It is sufficiently clear that the influencing condemned by the statute must relate to something with respect to which the official in question has legal power to act. If what were involved herein were the disposition of scrap lumber, and appellant were shown to have exercised an improper influence to perpetrate a fraud in that connection, there might be a sufficient case within the terms of the law. But as the facts are disclosed by this record, the Government's argument is unsupported either by fact or authority.

Appellee selects certain excerpts from the record and quotes them in its brief (pp. 14-15) in a fantastic attempt to show that he might conceivably have sent merchandise to appellant with no responsibility other than a pecuniary liability on his part to the Government. This passage is completely at variance with everything elsewhere officially shown, whether by regulation or testimony, and it is evidently a ridiculous hypothetical assumption by the witness and the prosecution of some imaginary power on the part of Lieutenant Apperson, invoked solely to make the accusation herein legally tenable. If the Court may not take judicial notice of the lack of any such power, surely the bulk of the record contains no evidence to support any such statement.

Appellee cites the *Blunden* case (169 F. 2d 991) for the argument that the statute covers not merely an influencing to make a decision but also a situation where the advice and recommendation of the official would be influential in securing the decision desired—irrespective of the absence of authority in the employee to make the final ruling. The difficulty with this argument is that there is no evidence in the record of any potency attaching to the advice or recommendations of Lieutenant Apperson. In the absence of evidence that appellant would be in a position to obtain the merchandise legally through the intervention of Lieutenant Apperson, the argument based on such a supposed factor completely collapses.

In answer to our argument of reversible error by reason of the reception of the testimony of the witness Walker, the Government argues (p. 21), "It does not appear to us that any proper objections were made to the evidence if it was objectionable." In making this assertion, the Government evidently overlooks or ignores the objection and exception (R. 212-213), following which the witness by his testimony placed a rather crooked complexion on appellant. Appellee declares further that it finds nothing (p. 22) that could be possibly construed as prejudicial to appellant in the testimony of Walker. Certainly, the imputation to appellant of language like "I am just an everyday guy; can you help me out?" was obviously mentioned (R. 213) to fasten upon appellant the onus of making overtures directed towards some ultimate evil end. Appellee in the same connection belittles our contention that the testimony was at variance with our theory developed on Apperson's cross-examination that appellant came to Montana at Apperson's instance. If the acts of which appellant was accused were wrongful, his prior conduct was clearly of no materiality; knowing what he did before would tend to prove or disprove his intent; the rule permitting other transactions is limited to cases where the acts of an accused are equivocal and susceptible of varying interpretations. The Government declares that this is a theory which it now finds in our brief but that it is "not an idea that can be found in the record in this case." This assertion overlooks R. 132-133 as well as R. 177-179, from which it actually appeared that Lieutenant Apperson made a collect telephone call to appellant and told him that he had better come to Montana. This is an instance of the manner in which the Government blandly ignores important elements of the case in its efforts to meet our arguments. In the same connection it is evident throughout that the authorities in Montana did go out of their way to accommodate appellant, and that Apperson proceeded to hire government labor to do the loading for appellant.

On the issue of withholding from appellant the records used by the special agent to refresh his recollection, the Government cites (p. 26) two cases which are obviously not applicable, one of them (*Harper v. United States*, 143 F. 2d 795) dealing with the verification of an immaterial date and the other (*Little v. United States*, 93 F. 2d 401) being substantially to the same effect—a witness using a memorandum merely to refresh her recollection as to whether a certain incident occurred on the 21st or 22nd of the month.

Appellee declares (p. 29) that “There just wasn’t any evidence on entrapment.” Of course, the Government’s *ipse dixit* does not make it so. There is no need to review again the evidence discussed in our main brief on this vital feature of the case (pp. 31-40). It is quite patent that when the jacket file was placed by Lieutenant Apperson before appellant, the disposal of articles in warehouse 1045 was not then pending in any official capacity before Apperson, and the procedure was followed for one purpose only, namely, to interest and induce appellant to offer a bribe. The approach was the outcome of an arrangement with the F.B.I. and the prosecuting officialdom, and if the picture disclosed by this record does not constitute at least an arguable question of entrapment, it would be difficult to envisage one. In any event the issue required adjudication by the jury.

For all of the foregoing reasons, as well as those set forth in appellant’s main brief, the judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

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LOUIS M. LEIBOWITZ,
of Counsel.

IN THE
United States Court of Appeals
For the Ninth Circuit

No. 12501

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

**PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF**

JACOB W. FRIEDMAN,
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LOUIS M. LEIBOWITZ,
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FILED

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 12501

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

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**PETITION FOR REHEARING AND BRIEF
IN SUPPORT THEREOF**

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Your petitioner, who is the appellant herein respectfully prays this Court to reconsider in certain respects its determination made on August 21, 1951, which reversed the judgment of the United States District Court for the District of Montana convicting your petitioner of a violation of Section 201, Title 18, United States Code, and directed the granting of a new trial.

The Court rendered an opinion by Biggs, Circuit Judge.

An examination of this holding discloses that the Court rejected six of the seven points raised by your petitioner, and sustained one of them, namely, one predicated upon an exception to certain language of the instructions. Several of the rejected points were of a character to necessitate the dismissal of the indictment, while others involved important rulings of a character likely to prejudice your petitioner's rights in subsequent proceedings. The purpose

of the present application is to ask the Court to reconsider the points which were not sustained and, if it should find them meritorious, to revise accordingly the decision heretofore rendered.

The omission to discuss anew points originally made on the plenary appeal is not to be construed as an abandonment by petitioner of those points.

For the reasons hereinafter to be set forth, your petitioner respectfully submits that a rehearing should be granted herein and the cause reconsidered to the end that the judgment of reversal heretofore rendered may be modified as may be just.

September 17, 1951.

JACOB W. FRIEDMAN,
Attorney for Petitioner-Appellant,
170 Broadway,
New York 38, New York.

LOUIS M. LEIBOWITZ,
of Counsel.

IN THE
United States Court of Appeals
For the Ninth Circuit

MEYER SCHNEIDER,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

ARGUMENT

I

We had argued on the original appeal that neither count of the indictment was sufficient as matter of law, since they did not describe the duties or official function of the recipient of the alleged bribe, nor did they state the decision, action or matter involved. The Court rejected this contention herein and declared that the statute "does not permit the drawing of such fine distinctions of exact duties as those sought to be maintained by the defendant".

The statute, however, is one that has been criticized for ambiguity, with the result that an extremely strict construction is necessitated. In *Krichman v. United States* (1921) 256 U. S. 363, 65 L. Ed. 992, the Supreme Court of the United States unanimously reversed a conviction of offering a bribe to a baggage porter while a railroad was under federal control, Mr. Justice Day writing:

"We are constrained to the conclusion that the construction given in the courts below, and insisted

upon by the government, practically recasts the statute from one embracing officials, and those discharging official functions, into one including every person discharging any sort of duty while the government is in control of the work.

“The government admits that the statute is ambiguous. While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government.”

The precision required in indictments is well exemplified by the recent holding in this very Court in *Carney v. United States* (1947, C. C. A. 9) 163 F. 2d 784, ruling that the amendment by the Court with consent by counsel of a portion of an indictment charging that the defendants counterfeited K-14 h gasoline ration coupons, in order to charge that defendants counterfeited A-14 h gasoline ration coupons was reversible error, since there is no authority in any court to amend or alter any part of an indictment without reassembling the grand jury; and there was accordingly a failure to prove the crime charged, notwithstanding that the misdescription was an inadvertence.

A point consistently litigated by defendant herein was that it was incumbent upon the government to prove—although it was not even sufficiently alleged in the indictment—that the person whose decision and action were sought to be influenced in his official capacity and function did actually possess an official capacity and function with respect to the subject-matter of the attempted influencing. In its efforts to establish this indispensable element of

the government's case, the prosecution introduced documentary proof that one "First Lt. Harvey D. Apperson, Jr.," or "Harvey O. Apperson, Jr." was designated "Salvage and Property Disposal Officer." Apart from everything else in the case, the proof in this fashion constituted a fatal variance with regard to what was charged in the indictment, in several significant details. To begin with, the indictment referred to Harvey B. Apperson, whereas the proof was Harvey D. Apperson, Jr., or Harvey O. Apperson, Jr., either one of whom might have been an entirely different individual. Moreover, the indictment described his position, so far as pertinent, as "United States Air Force and Base Salvage Officer of the Great Falls United States Air Force Base." The designation, however, was "Salvage and Property Disposal Officer." Inasmuch as the indictment described the Harvey B. Apperson mentioned therein as both an officer and a person acting for the United States—two distinct classes of persons (*United States v. Kemler* [1942], 44 F. Supp. 649, and *Shields v. United States* [App. D. C.], 26 F. 2d 993)—defendant was certainly entitled to be apprised of the exact capacity wherein he was allegedly acting, so that a substantial difference in the proof impels the conclusion that the government failed to sustain the allegations of the indictment, such as they were. This point was duly raised on the motion for judgment of acquittal (R. 12-13). The obviousness of the ensuing prejudice springs from a realization that if defendant had been accurately and correctly informed by virtue of proper pleading in the indictment of the exact designation of the officer, relied on through Government's Exhibit 7, purporting to establish the officer's official designation and capacity, defendant would have been in a position to litigate the issue of whether such officer actually was vested with the power to act in the subject-matter of the alleged bribe.

The indictment herein is subject to substantial criticism in that the caption of the first count is "Offer of Bribe" whereas the language of the count itself charges a promise to bribe. The opinion rendered herein failed to differentiate between these two manners of committing the offense, although it is well established that they constitute entirely different and distinguishable crimes. *United States v. Michaelson* (C. C. A. 2) 165 F. 2d 732. The doubt which pervaded this count by reason of the differing characterizations of the offense was duly raised below (R. 6). The resulting confusion even caused the trial judge to refer to the offense as an offer (R. 205) rather than a promise. Moreover, in *United States v. Kemler* (1942) 44 F. Supp. 649, the Court held that there were three distinct methods of committing the statutory offense, namely, offering, promising and giving. See also *Malatkofski v. United States* (C. C. A. 1, 1950) 179 F. 2d 905. Herein both this Court and the Court below appear to have ignored the allegation of promising in the indictment and referred to the case as though it involved merely an offer (opinion, p. 4).

Defendant is not accurately apprised of the offense of which he is accused when there is a patent discrepancy between the caption and the violation alleged. He cannot even at this point say with what crime he was charged or of what violation of law he was convicted. These are things which should readily be ascertainable from an inspection of the indictment, both from the standpoint of conducting an effective defense, protecting his rights with respect to double jeopardy and other considerations affecting a conviction. The indictment is susceptible of the meaning that the grand jury intended to accuse defendant of an offer of a bribe, but a grave doubt of this was introduced by its proceeding to allege a promise. Since it is not permissible to speculate as to the grand jury's meaning,

a fatal ambiguity has been introduced into the charge, in contravention of elementary requirements of criminal pleading. *Carney v. United States* (1947, C. C. A. 9) 163 F. 2d 784.

II

The indictment presents another major defect in the omission of any sufficient allegation of the matter supposedly pending before Apperson, adequate to enable a defendant to prepare his defense. All that the indictment has to say in this regard is "a certain matter then pending before him in his official capacity". Defendant promptly raised (R. 48) the failure of the indictment to allege either the matter that was then pending before the officer or the nature of the unlawful act defendant had attempted to induce him to do. The barest minimum requirement of an indictment for such a crime would call for an allegation or exact description of the matter pending before the officer so that, for one thing, it could be determined whether it was actually embraced within his duties or functions. The defendant is surely entitled to know from a perusal of the accusation whether the matter was something over which the officer had authority, and, in fact, whether it was actually something "then pending", as barely alleged in the indictment, rather than a matter which was already concluded—the proof indeed establishing that the only matter in Apperson's jurisdiction as to which he had dealings with defendant was a *fait accompli* with the merchandise paid for in full. The uncertainty is enhanced by the indictment's use of the words "officer and person", each of whom might have widely divergent powers and authority. The substantial character of this criticism was exemplified in the progress of the trial, the evidence showing conclusively that defendant had paid in full the price of the merchandise whose delivery the officer

was to supervise. Defendant received the merchandise and paid for it. There is no suggestion that there was any fraud or wrongdoing with respect thereto. The matter was therefore concluded. There was clearly no influencing of a decision in connection therewith, and there was nothing further pending before Apperson in an official capacity. It therefore became impossible to determine whether the new dealing was something negotiated by Apperson or of what it consisted. The proof clearly showed that the merchandise stored in warehouse 1045 was not a subject which came before Apperson in any capacity. The government completely failed to show a violation of duty with regard to the only matter actually pending before Apperson, and for which defendant came to Montana. The conviction was therefore faulty in both the failure to allege and the failure to prove, the two deficiencies concurring in such fashion as to call for a dismissal of the indictment.

III

The indictment was independently faulty in its failure to allege the duties of the officer involved. See *United States v. Kemler* (C. C. A. 1, 1942) 44 F. Supp. 649; also 133 F.2d 235. In the instant case the Court held it sufficient to designate Apperson as an officer and a person acting for the United States in an official capacity. However, the indictment should have described in what capacity he was acting as such person, the duties of that particular person and by whom he was authorized to act. The Court says specifically (p. 4), "Apperson's official duties, as the indictment clearly alleges, required him to protect the government property on the base." However, the indictment can be searched in vain for any such allegation, and we believe this Court erred in reading into the indictment language which was absent therefrom. We have already argued at length in our main brief (pp. 15-22) that the

proof failed completely to show the existence of any official duty in connection with the sale or disposition of the property involved. The requirement of alleging the exact official function is well established. See *Kellerman v. United States* (C. C. A. 3, 1924) 295 F. 796; *United States v. Marcus* (C. C. A. 3, 1948) 166 F. 2d 497; *Nordgren v. United States* (C. C. A. 9, 1950) 181 F. 2d 718.

IV

Without prejudice to our argument that the indictment should be dismissed, we desire to point out that the Court improperly rejected our argument on the defense of entrapment. As was recently held in *Malatkofski v. United States* (C. C. A. 1, 1950) 179 F. 2d 905, in a *Per Curiam* opinion:

“We held that the defendant was entitled to an instruction that if the defendant never conceived any intention of committing the offense of bribery but the officers of the government incited and lured the defendant to commit such offense ‘in order to entrap, arrest, and prosecute the defendant therefor,’ then the defendant should be acquitted.”

Like elements existed in the case at bar, but defendant was never accorded the benefit of such instructions or rulings, to all of which exception was duly taken (R. 339, 348, 351, 352, 360-361). There was a substantial volume of proof strongly supporting the defense of entrapment. Without attempting to review it (see our main brief, pp. 31-43) we are constrained merely to mention that when Apperson was asked by the Trial Court whether Apperson’s exhibition of the file was “the beginning of the plan or whatever it was”, he answered, “Yes, sir. I just put this thing in front of him to see what he would do” (R. 204). This, we submit, was entrapment as matter of law, and for this Court to conclude (p. 7) “that there is no substan-

tial evidence of entrapment in the record"—even sufficient to make a jury issue—is palpably erroneous.

Petitioner therefore asks the Court to re-examine its decision to the end that the foregoing errors may be corrected and the indictment dismissed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner-Appellant.

LOUIS M. LEIBOWITZ,
of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition and brief are presented in good faith, are well founded and are not interposed for delay.

JACOB W. FRIEDMAN,
Attorney for Petitioner-Appellant.

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MEYER SCHNEIDER,

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vs.

UNITED STATES OF AMERICA,

Appellee.

**PETITION FOR REHEARING AND
SUPPORTING BRIEF**

DALTON PIERSON,
United States Attorney,
Butte, Montana;

EMMETT C. ANGLAND,
Assistant United States Attorney,
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Attorneys for Appellee.

Filed....., 1951.

....., Clerk.



FILED

SEP 20 1951

PAUL B. O'BRIEN



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IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MEYER SCHNEIDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**PETITION FOR REHEARING AND
SUPPORTING BRIEF**

Comes now the Appellee, United States of America, and respectfully petitions the Court that it grant to it a rehearing in the above entitled cause.

In support of its petition for rehearing appellee respectfully submits the following reasons, to-wit:

I.

That in rendering its decision herein the Court has overlooked controlling decisions of United States Courts and other courts and that its decision is in conflict therewith.

II.

That in rendering its decision herein the Court has overlooked or misapplied certain Acts of Congress controlling the Court on this appeal.

ARGUMENT

At the outset in submitting this petition for rehearing, we feel obliged to apologize to the Court for not having submitted additional authorities in our brief in this case on the point upon which the Court has determined the case should be reversed.

We are of the view that the charge given by Judge Pray with reference to criminal negligence is supported by the authorities. The charge was not, as we view it, given with any thought that this was a negligence case involving careless conduct. Rather, as we will hereafter point out, the authorities support the charge as given by the trial Court permitting the jury to determine that intent may be supplied by criminal negligence.

As we read the opinion of this Court it is determined that criminal negligence cannot supply the intent necessary to be found by the jury in order to sustain a conviction for a violation of Section 201, Title 18, U. S. C. Ordinarily the rule is as stated in *22 C. J. S., Sec. 29, page 84*.

"Except as otherwise provided by statute, an overt act to constitute a crime must be accompanied by a criminal intent or by such negligence as is regarded by law as equivalent to a criminal intent."

" * * * To constitute a crime the act must, except as otherwise provided by statute, see *infra* No. 30, be accompanied by a criminal intent on the part of accused, or by such negligent and reckless conduct and indifference to the consequences of conduct as is regarded by the law as equivalent to a criminal intent."

Wherein does the definition of criminal intent given by Judge Pray differ. He states:

"Now criminal negligence in that connection means the doing of an act with a reckless disregard of the

consequences, not caring particularly what happened.” (R. 364).

Surely if that was the state of mind of the appellant Schneider he did possess a specific criminal intent to offer money for a bribe and to pay money as a bribe. Conduct such as that defined by Judge Pray in his charge to the jury is we submit sufficient to supply the requisite intent which the jury by their verdict did find that the defendant possessed.

In *Branson's Instructions to Juries, Second Edition, Sec. 581 (2)* we find approval given to a similar charge to that given in this case:

“The court instructs the jury that although it is the law in this state that a criminal offense consists of a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, yet where, without intoxication, the law will impute to the act a criminal intent, as in the case of wanton killing without provocation, voluntary drunkenness is not available to disprove such intent.”

The common law rule, while it does not appear in the United States Code, is adopted in the *Montana Codes, Section 94-117, Revised Codes of Montana, 1947*:

“In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.”

This section in Montana was adopted from the California Code (Cal. Pen. C. Sec. 20).

The Montana Supreme Court has held that an instruction embodying this section should always be given,

State v. Allen,

34 Mont. 403; 87 Pac. 177, 183.

In its decision this Court stated that the defendant could not possibly have negligently offered a bribe or given one but the jury under the instructions given could have concluded that mere careless conduct was sufficient to sustain his guilt. The fact is that there is no evidence of negligence in the case. We note in the case of *Lonergan v. United States*, 88 F. 2d 591 at 595 this Court held, to show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which the instructions could be properly applied:

“Assignments 28 and 29 are to the refusal of requested instructions. Assuming, without deciding that these were correct statements of law, it does not follow that, in refusing them, reversible error was committed. Error, to be reversible, must be shown to have been prejudicial. *Walton v. Wild Goose Mining & Trading Co.* (C. C. A. 9) 123 F. 209, 219. To show prejudice in the refusal of requested instructions, it must be shown that there was evidence to which such instructions were properly applicable. (Cases cited).”

To the same effect are:

Conway v. United States,
142 F. 2d 202, 205;

Todorow, et al. v. United States,
173 F. 2d 439, 445.

Now the logic of that statement is as we all know, instructions operate only upon evidence and if an instruction is given and there is no evidence upon which the instruction can operate then the instruction cannot be held to have prejudiced the objecting party. It is to be noted with what care Judge Pray charged the jury that their verdict should be based solely upon the evidence presented in the case.

Particular attention is directed to the following portion of the charge:

“Now, gentlemen, here is something that the court should make a statement on. You have noticed some colloquies and disputes between counsel and between the court and counsel during the progress of this trial. Now you will not be influenced by colloquies or disputes during the trial between counsel or between counsel and the court or between the court and counsel, or counsel and the witnesses, or remarks or statements, or any remark or statement not based upon the evidence. You will base your verdict solely upon the evidence submitted to you and wholly disregard the remarks of counsel not bearing upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence, and any evidence erroneously submitted and afterwards excluded you will also disregard. Now that also refers to anything you may have heard about this case or read about it on the outside at any time or during the progress of this trial. You are to dismiss it wholly from your minds and make up your minds as to what your decision will be from a discussion of the evidence here and discussion of the exhibits that have been introduced in evidence in this case which you may wish to read and consider and further discuss. Now the case is based upon that, and that solely, the evidence presented here and the exhibits presented here.” (R. 371).

We call attention to the Acts of Congress to point out that even if we should, as we do not, admit for the purposes of argument, that there was error in defining criminal negligence, yet that error cannot in our opinion by any stretch of the imagination, have prejudiced the defendant.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

“Harmless error. Any error, defect, irregularity or

variance which does not affect substantial rights shall be disregarded.”

Rule 52(a) of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A.

Section 2111, Title 28, U. S. C. A., provides:

“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”

This Court has stated with respect to Rule 52(a):

“It was to cover cases precisely like the present, in which a convicted defendant seeks to escape condign punishment by raising technical objections, that Rule 52(a) of the new Federal Rules of Criminal Procedure, 18 U. S. C. A. following section 687, was promulgated.”

Phelps v. United States,
160 F. 2d 626, 629.

(The record in that case will show that an almost identical instruction to the one found erroneous here was given.)

and again,

“The jury was sufficiently instructed and could not have been misled by the instruction complained of.”

Himmelfarb v. United States,
175 F. 2d 924, 943.

and again,

“We have examined this record with care to assure ourselves that substantial rights of appellants (who did not testify) have not been invaded by the wrongful admission of evidence and by the instructions to the jury. The instructions adequately informed the jury concerning the weight to be given circumstantial evidence and the necessity of receiving with caution the testimony of an accomplice or co-conspirator; the quantum and character of proof necessary to establish the existence of a conspiracy; the element of reasonable

doubt regarding the guilt of any one of the appellants, and the necessity of applying the rule of reasonable doubt to every material element of the events charged in the indictment. The rule of proof as to the establishment of the commission of overt acts was properly stated. From our examination we are satisfied that the instructions, taken as a whole, correctly presented the law to the jury."

Blumenthal et al. v. United States,
158 F. 2d 883, 891.

According to the opinion of the United States Supreme Court that it had considered all of petitioners contentions in granting certiorari it can only be assumed that the United States Supreme Court did affirm the above statement of this Court. See *Blumenthal v. United States*, 332 U. S. 539; 68 S. Ct. 248; 92 L. ed. 154. In yet another case this Court stated:

"The court in the present case fully instructed the jury that they should confine themselves to considering only the evidence introduced; that such inferences as they might draw must be based upon that evidence alone, not upon speculation as to evidence which might have been introduced; and that statements of counsel in argument or presentation are not evidence. Refusal to add appellants' proposed cautionary instruction under these circumstances, if error, was not prejudicial."

Nye & Nissen et al. v. United States,
168 F. 2d 846, 857.

Consistent with the foregoing decision we call attention of the Court to the impartial and scrupulously fair charge given in this case. It is to be particularly noted that the trial judge advised the jury that he did not comment on the evidence in this case, but again cautioned the jury to apply the rules of law to the evidence. (R. 373).

In reviewing this matter we must bear in mind that in

using the words criminal negligence the Court was not making criminal negligence an issue in the case as might be thought from reading the objection to the instruction made by counsel for the defendant as follows:

“That the instructions of the court are erroneous in defining in this case as one element of a crime criminal negligence and then in turn defining criminal negligence because the gist and substance of this case is intent and the acts or those charged to have been done must have been done intentionally and no question of criminal negligence can be considered by the court in relation thereto as intent is a material part of the charge.” (R. 375).

The Court was not speaking of negligence as applied to civil cases. The Court was clearly referring to intent and did not by the charge complained of make criminal negligence a separate element of the crime. To take that view would be doing exactly what was condemned by the Court in *United States v. Angelo* (3 cir.) 153 F. 2d 247 at 252 wherein the Court stated:

“The exception to the charge on the ground that the court misused the word ‘presumption’ is untenable. Taken out of context, there might be some basis for this contention. There is none, however, when read in the light of the remainder of the charge.”

If this Court is of the view that no mention of criminal negligence should have been made, yet we submit that the charge should be interpreted in the light of the conceded facts of the case as stated in *Buckley v. United States*, 33 F. 2d 713, 718:

“ * * * Under the conceded facts of this case, there was no necessity for instructing as to criminal intent with the precision that would sometimes be appropriate. If Buckley offered a bribe, as testified to by Eckhart, the offer necessarily carried with it a criminal

intent. If Buckley told the truth, no offer whatever was made by him. Under such circumstances, there is little room for controversy about criminal intent. Moreover, the essential criminal intent under this statute is nothing but the intent to influence the action of the officer in any matter of official duty before him, and this element of the crime was expressly stated by the judge in the instructions which he gave. Under the facts of this case, there is no substantial difference between saying that defendant must have a criminal intent and saying that the bribe which he offered must have been for the purpose of influencing the officer as to his official duty."

* * *

"* * * However, a charge is always to be interpreted in connection with the conceded facts of the case; and here there was no room for suggesting to the jury, nor would it have been entitled to consider, the idea that if Buckley made the disputed offer it was made with any purpose except to induce the nonperformance of duty. We are satisfied that any omission of a more formal charge on the subject of intent was without prejudice."

The evidence of guilt in the record in this case is so clear and convincing that we cannot see how possible harm could have been done to the defendant by the instruction held erroneous in the Court's opinion. Rather we believe this Court should reiterate the rule laid down in *McCoy v. United States*, 169 F. 2d 776, 787 as follows:

"Our method of trying those accused of crime is to submit the issue of guilt or innocence to a jury upon the evidence adduced and the applicable law as given it by the court. When the case has been submitted to the jury for decision under the instruction that guilt is only to be found in case the jury regards guilt as the only reasonable determination, the verdict should not be set aside by us unless as a matter of law we should find that there is no adequate support in the evidence for such determination. Otherwise we should be interfering

with the jury's function. We cannot find such lack of support in the evidence of our case."

There is ample evidence to support the verdict in this case.

CONCLUSION

We respectfully submit that this petition for rehearing should be granted and the judgment of the trial Court affirmed.

Respectfully submitted,

DALTON PIERSON,

United States Attorney;

EMMETT C. ANGLAND,

Assistant United States Attorney.

I, Emmett C. Angland, do hereby certify that I am a member of the bar of this Court and one of the attorneys of record in the foregoing cause; that the foregoing petition for rehearing, prepared and presented on behalf of appellee, for whom I am one of the attorneys, is in my opinion well founded and is not interposed for delay.

EMMETT C. ANGLAND,

Assistant United States Attorney.

No. 12503

United States
Court of Appeals
For the Ninth Circuit.

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 432)

Appeal from the District Court
for the Territory of Alaska
Third Division

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN S. HELLENTHAL,

RALPH H. COTTIS,

Box 941, Anchorage, Alaska.

For Appellees:

STANLEY M. McCUTCHEON,

BUELL A. NESBETT,

Anchorage, Alaska.

In the District Court for the Territory of Alaska,
Third Division

No. A-4979

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Plaintiffs,

vs.

LAURENCE STARNs, JOE BLACKARD, and
GLEN PHILLIPS,

Defendants.

AMENDED COMPLAINT

Comes now the plaintiffs and for cause of action against the defendants complain and allege as follows:

I.

That said plaintiffs are copartners engaged in the restaurant business under the firm name and style of Alaska Food Service, said business being located at Anchorage, Alaska, in premises described as the Panhandle Bar and Cafe at 314 Fourth Avenue in said city.

II.

That said defendants purportedly hold a leasehold right in said premises by virtue of a lease from Anna K. Campbell, owner, to defendants.

III.

That on or about the 4th day of February, 1948, at Anchorage, Alaska, defendant, Joseph Blackard, entered into a lease agreement with plaintiff, Vern Humphries, whereby defendant agreed to lease to plaintiff Vern Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Joseph Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for said operation, a copy of said lease being attached hereto and made a part of this amended complaint, marked "Exhibit A."

IV.

That it was further agreed by the terms of said lease described in paragraph III hereof, that plaintiff would pay to defendant as rental for said premises, Six Per Cent (6%) of the gross receipts derived from all operations of said restaurant business or the sum of Two Hundred Dollars (\$200.00) per month, whichever might be the greater.

V.

That pursuant to an offer by defendant, Joseph Blackard, and acceptance by plaintiff, Vern Humphries, said agreement of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Vern Humphries, from defendant in accordance with the terms of said agreement.

VI.

That relying on said agreement, plaintiff expended large sums of money in the construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business, including ranges, stools and other necessary fixtures and equipment.

VII.

That said counter and equipment is located in the Southwest portion of said Panhandle premises. That said restaurant business was so located at the direction of defendants herein.

VIII.

That plaintiffs are now entitled to the possession of said restaurant premises in accordance with the agreement existing between plaintiff and defendant.

IX.

That plaintiff has performed all the things and conditions required by said agreement to be performed by the lessee.

X.

That plaintiff commenced the operation of said restaurant business on or about the 6th day of March, 1948.

XI.

That since the commencement of said business, defendants have maliciously, wilfully and wantonly interfered with plaintiff's business, resulting in great loss of profits to plaintiff.

XII.

That on or about the 20th day of April, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof, all to plaintiffs' damage.

XIII.

That defendants have refused and neglected to provide plaintiffs' light, heat and water for said restaurant business as required by said agreement, all to plaintiffs' damage in the sum of Five Hundred Seventy Five Dollars (\$575.00).

XIV.

That defendants have maliciously, wilfully and unlawfully operated and conducted gambling games interfering with and otherwise being detrimental to plaintiffs' business all to plaintiffs' damage.

XV.

That defendants have wilfully and maliciously injured plaintiffs' credit rating, much to plaintiffs' damage.

XVI.

That on or about the 5th day of May, 1948, defendants did, with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiffs' damage.

XVII.

That on or about the 5th day of May, 1948, at the hour of 1:30 o'clock in the morning of said day, de-

fendants took possession of plaintiffs' restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and that plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business.

XVIII.

That because of the acts of defendants, plaintiffs have been damaged in the sum of Ten Thousand Five Hundred Seventy Five Dollars (\$10,575.00).

XIX.

That plaintiffs have regained possession of the said premises and are now in possession thereof, but that defendants threaten to continue interfering with plaintiffs' business and that plaintiffs have no speedy or adequate remedy at law.

XX.

That defendants have threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business.

Wherefore, plaintiffs pray judgment against defendants as follows:

1. For the sum of Ten Thousand Five Hundred Seventy Five Dollars (\$10,575.00) in actual damages.

2. For the sum of Ten Thousand Dollars (\$10,000.00) in exemplary damages.

3. That defendants and each of them be restrained and enjoined from in any manner interfering with plaintiffs' business.

4. For such other and further relief as the Court may deem equitable in the premises.

McCUTCHEON & NESBETT,
Attorneys for Plaintiffs.

By /s/ S. J. McCUTCHEON.

United States of America,
Territory of Alaska—ss.

Vern Humphries and Marvin Campbell, being first duly sworn, each for himself and not one for the other, doth depose and say: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

/s/ VERNON HUMPHRIES,

/s/ MARVIN CAMPBELL.

Subscribed and Sworn to before me this 7th day of May, 1948.

[Seal] /s/ SHELLE W. BROOKE,
Notary Public in and for
Alaska.

My Commission expires: 2-3-52.

EXHIBIT "A"

Agreement

This agreement, made and executed in duplicate at Anchorage, Alaska, this 4th day of February, 1948, by and between Joe Blackard of Anchorage, Alaska, hereinafter referred to as "Blackard," and Vernon Humphries and Kenneth Havins known as the Alaska Food Service, hereinafter referred to as "Humphries."

Witnesseth:

That in consideration of the mutual promises hereinafter set forth, the parties hereto have agreed, and by these presents do agree as follows:

Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska.

Blackard agrees to furnish the space, light, heat and water necessary for such operation and to provide the utensils and equipment now on the premises. Humphries represents that he has examined the foregoing and is satisfied therewith.

Humphries shall operate the foregoing restaurant as an independent contractor and will indemnify Blackard from any liability for debts and obligations incurred by Humphries. To implement this agreement, Humphries shall provide bond in the sum of \$3000.00 for the purpose of protecting Blackard from any claims made against Blackard, and arising out of acts or omissions to act on the part of Humphries.

Humphries shall pay to Blackard on or before the 10th day of each month a sum equal to 6% of the gross receipts derived from all operations conducted by Humphries upon the premises or the sum of \$200.00, whichever is the greater.

Humphries shall keep accurate books of account, showing all receipts from said operations of whatsoever nature including airlines business; Humphries agrees to clear all sales through cash register tapes. All books and tapes shall be open to inspection by Blackard, at reasonable times.

Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage, Humphries agrees to endeavor to obtain the highest possible grading thereunder.

The parties understand that the present restaurant equipment is to be moved to a new location approximately 18' South of its present site. Humphries agrees to bear all expense of moving said equipment and all expenses incurred in furnishing and maintaining additional equipment and utensils as demand may from time to time require. At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory and allowed to move or sell additional equipment when agreement terminated.

In event Humphries defaults in the terms of this agreement Blackard may terminate this one year

agreement upon 24 hours notice. Humphries may terminate this agreement upon 30 days notice. Upon termination Blackard agrees to reimburse Humphries for the cost of consumable supplies.

Neither party may assign his interest hereunder without the written consent of other party.

Humphries shall furnish all labor and supplies necessary to provide service adequate for the demand encountered.

Witness the hands and seals of the parties date first written.

/s/ JOE BLACKARD,

/s/ VERNON HUMPHRIES,

/s/ KENNETH HAVINS.

Witness:

/s/ S. McCUTCHEON.

[Endorsed]: Filed May 7, 1948.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants by their attorneys, Hellenthal, Hellenthal and Cottis, and for their Answer to the Complaint of the Plaintiffs, admit, allege and deny, as follows:

I.

Admit the allegations of Paragraphs I and II of said Amended Complaint.

II.

Deny each and every other allegation of the Complaint.

Wherefore, the defendants pray that the said cause be dismissed and that they have judgment against the defendants for their costs, disbursements and attorneys' fees herein.

/s/ RALPH H. COTTIS,

HELLENTHAL and COTTIS,
Attorneys for defendants.

United States of America,
Territory of Alaska—ss.

Joe Blackard, being first duly sworn, upon oath, deposes and says:

I am one of the defendants in the foregoing action; I have read the foregoing Answer, know the contents thereof and the matters and things therein set forth are true as I verily believe.

/s/ JOE BLACKARD.

Subscribed and sworn to before me this 24th day of May, 1948.

[Seal] /s/ MARY KILROY,
Notary Public for Alaska.

My Commission expires: 11/10/51.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

VERDICT

We, the jury duly sworn and empaneled to try the above-entitled cause, do find for the plaintiffs and against the defendants, Laurence Starns, and Joe Blackard, and find that the plaintiffs are entitled to recover of and from said defendants the sum of Five Thousand Nine Hundred and Thirty Five Dollars (\$5,935.00) as compensatory damages, and further find that the plaintiffs are entitled to recover of and from said defendants, Laurence Starns, and Joe Blackard, the additional sum of Two Thousand Five Hundred Dollars (\$2,500.00) as punitive damages.

Dated at Anchorage, Alaska, this 6th day of July, 1949.

/s/ MAURICE A. STAFFORD,
Foreman.

[Endorsed]: Filed July 6, 1949.

[Title of District Court and Cause.]

**MOTION TO REJECT VERDICT OF JURY
AND FOR ALTERNATIVE RELIEF**

Come now the defendants Joe Blackard and Laurence Starns in the above-entitled matter by their attorneys Hellenthal, Hellenthal & Cottis and move this court as follows:

1. That the verdict of the jury herein rendered on the 6th day of July, 1949, be rejected in its entirety for the reason that it is not supported by a preponderance of the evidence and was an advisory verdict only.

2. That the said verdict be rejected as to the defendant Laurence Starns for the reason that as to the said defendant such verdict is contrary to the weight of the evidence.

3. That the said verdict be rejected insofar as it includes punitive damages for the reason that it is contrary to the weight of the evidence in such respect.

4. That the said verdict be rejected insofar as it exceeds the sum of Two Hundred Forty Dollars (\$240.00) for the reason that no sufficient proof was offered of damages in excess of said sum.

5. That the said verdict be rejected for the reason that the undisputed evidence showed a termination of the plaintiff's right of occupancy of the premises on 16 April, 1948, and the complaint alleges no wrong-doing prior to that date.

6. That the said verdict be rejected upon the ground that this court in determining the validity of a temporary restraining order in this cause of necessity determined the issue of right to occupancy of the premises, and the said verdict is contrary to such determination.

As an Alternative to the Foregoing Relief, the Said Defendants Move That the Verdict Be Set Aside and a New Trial Granted Upon the Following Causes, or Any of Them, Which Causes Materially Affect the Substantial Rights of the Said Defendants:

1. Irregularity in the proceedings of the adverse party, in that the names of various persons generally known to the jury as having nefarious occupations or as being notorious were unjustifiably linked with the names of the defendants and thereby prejudiced the rights of the defendants.

2. The damages awarded were excessive and appear to have been given under the influence of passion or prejudice. The evidence was insufficient to justify the verdict.

3. The verdict is against law.

4. Error in law occurred at the trial and was excepted to by the defendants in that the issues were confused by the admission of irrelevant testimony concerning the purchase of equipment by the plaintiffs, the circumstances of the arrest of one plaintiff for having in his possession illegal moose meat, the refusal of the court to instruct the jury that al-

leged acts occurring after 16 April, 1948, were immaterial, and evidence not related to the complaint was admitted over objections of the defendants.

This motion is based upon the records, files, and proceedings in this cause.

Dated at Anchorage, Alaska this 8th day of July, 1949.

/s/ RALPH H. COTTIS,

For Hellenthal, Hellenthal & Cottis Attorneys for Defendants.

Service of copy admitted.

[Endorsed] Filed July 8, 1949.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

You are instructed as follows:

1.

This case is a civil case in which Vern Humphries and Marvin Campbell are plaintiffs and Laurence Starns, Joe Blackard and Glen Phillips are defendants.

In their amended complaint, which was filed on May 8, 1948, the plaintiffs allege that they are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service

and that said business was located in the premises described as the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the city of Anchorage, Alaska; that defendants hold a leasehold right in said premises by virtue of a lease from Anna K. Campbell, the owner of the premises, to the defendants; that on or about the 4th day of February, 1948, at Anchorage, Alaska, the defendant Blackard entered into a written lease agreement with plaintiff, Humphries, a copy of which, as plaintiffs assert in their amended complaint, being attached thereto, whereby defendant, Blackard, agreed to lease to plaintiff, Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for such operation; that it was further agreed by the terms of said agreement that plaintiff would pay to defendant as rental for said premises 6 per cent of the gross receipts derived from all operations of said restaurant business or the sum of \$200.00, per month whichever might be the greater; that pursuant to an offer by defendant Blackard and accepted by plaintiff Humphries, said agreement of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Humphries, from defendant in accordance with the terms of said agreement; that relying on said agreement plaintiff expended large sums of money in the

construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business including ranges, stools and other necessary fixtures and equipment; that said counter and equipment was located in the southwest portion of said Panhandle premises and was there so located at the direction of the defendants; that plaintiffs at the time of filing said amended complaint were entitled to the possession of said restaurant premises in accordance with the agreement mentioned; that plaintiff performed all of the things and conditions required by said agreement to be performed by the lessee; that plaintiff commenced the operation of said restaurant business on or about March 6, 1948, and that after the commencing of said business, defendants maliciously, wilfully and wantonly interfered with plaintiffs' business resulting in great loss of profits to plaintiff; that on or about April 20, 1948, defendants took possession of plaintiffs' store-room, a part of said leased premises, and failed and refused to permit plaintiff the use thereof; that defendants refused and neglected to provide plaintiffs with light, heat and water for said restaurant business as required by said agreement, to plaintiffs' damage in the sum of \$575.00; that defendants maliciously, wilfully and unlawfully operated and conducted gambling games, interfering with and otherwise being detrimental to plaintiffs' business, whereby plaintiffs' business was damaged; that defendants wilfully and maliciously injured plaintiffs'

credit rating much to plaintiffs' damage; that on or about May 5, 1948, the defendants did with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff whereby plaintiffs sustained damage; that on or about May 5, 1948, at the hour of 1:30 o'clock in the morning of said day the defendants took possession of plaintiffs' restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business; that defendants threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business; that because of the acts of defendants, plaintiffs have been damaged in the sum of \$10,575.00.

The plaintiffs asked for judgment against the defendants in the sum of \$10,575.00 in actual damages and in the additional sum of \$10,000.00 in exemplary damages.

It appears from the undisputed testimony that since this action was brought the premises in question has been destroyed by fire. Accordingly the prayer of the plaintiffs' amended complaint that the defendant be restrained and enjoined from interfering with plaintiffs' business can not be granted and this action is now resolved into an action ~~at law~~ to determine whether or not the plaintiffs are entitled to recover any damages from the defendants by reason of the evidence given in support of the plaintiffs' amended complaint.

To the plaintiffs' amended complaint, the defendants on June 15, 1949, filed an answer admitting the allegations of Paragraphs 1 and 2 of the amended complaint and denying all other averments contained in the amended complaint. You will observe that Paragraphs 1 and 2 of the amended complaint allege that plaintiffs are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service, and that the business at the time of the filing of the amended complaint was located in the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the city of Anchorage, Alaska, and that the defendants held a leasehold right in said premises by virtue of a lease from the owner, Anna K. Campbell, to the defendants. It is, therefore, obvious that the defendants have denied all of the averments which in any manner allege that the plaintiffs have been damaged by any acts or omissions of the defendants. The foregoing constitutes a condensed statement of what the respective parties assert in their pleadings in this case. When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case consisting of plaintiffs' amended complaint and the defendant's answer thereto so that you may there read and consider said pleadings and determine the precise nature of the respective claims of the plaintiffs and of the defendants as stated in their pleadings.

1-A

In their amended complaint, the plaintiffs state that a copy of the alleged lease is attached to and

made a part of the amended complaint, but the plaintiff, Humphries, in his testimony stated, in substance, that the written agreement on which the plaintiffs rely differs in some respects from the agreement of which a copy is attached to the plaintiffs' amended complaint, and that the agreement finally entered into between the parties is the one of which a copy is attached to the amended complaint in cause No. A-5001, introduced in evidence during the trial and marked plaintiffs' Exhibit No. 3. Plaintiff, Humphries, in his testimony also asserted that the final written agreement entered into between the parties was thereafter modified by oral agreement or agreements, concerning the furnishing of a bond and otherwise.

~~The defendants, Blackard, and Starns, in their his testimony have has denied the assertions of the plaintiff, Humphries, as regards the final written agreement and the oral modifications thereof.~~

Nothing in the law prevents or forbids the change, alteration or modification by oral agreement of such a written agreement as that relied upon here by either the plaintiff or the defendant.

It is for you to determine from all of the evidence what agreements, oral or written, or both, were entered into between plaintiffs and defendants.

In this case, as in all civil cases, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evi-

dence. If the evidence in your mind is equally balanced as between the plaintiffs and defendants, then the verdict should be for the defendants, because the burden is upon the plaintiffs to present evidence of greater weight than that in favor of the defendants before plaintiffs are entitled to recover.

7.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in everyday affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

8.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced in your judgment, to speak the truth or otherwise as to matters within his knowledge.

Dated at Anchorage, Alaska this 5th day of July, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed July 6, 1949.

In the District Court for the Territory of Alaska,
Third Division
No. A-4979

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Plaintiffs,

vs.

LAURENCE STARNES, JOE BLACKARD and
GLEN PHILLIPS,

Defendants.

JUDGMENT

This cause having come on regularly for trial on the 21st day of June, 1949, and having been concluded on the 6th day of July, 1949, the plaintiffs having appeared in person and by their counsel, Stanley J. McCutcheon, Esq., and the defendants having appeared in person and by their counsel, Ralph Cottis, Esq.; a jury of twelve persons having been regularly impanelled and sworn to try said action, witnesses on the part of plaintiffs and defendants having been sworn and examined, and after hearing the evidence, and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into court with the verdict signed by the foreman, and found in favor of the plaintiffs by the following verdict:

Verdict

We, the jury, duly sworn and empanelled to try the above-entitled cause, do find for the plaintiffs and against the defendants, Laurence Starnes and

Joe Blackard, and find that the plaintiffs are entitled to recover of and from said defendants the sum of Five Thousand Nine Hundred Thirty Five Dollars (\$5,935.00) as compensatory damages, and further find that the plaintiffs are entitled to recover of and from said defendants, Laurence Starns and Joe Blackard, the additional sum of Two Thousand Five Hundred Dollars (\$2,500.00) as punitive damages.

Dated at Anchorage, Alaska, this 6th day of July, 1949.

/s/ MAURICE A. STAFFORD,
Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiffs have and recover from said defendants, the sum of Eight Thousand Four Hundred Thirty Five Dollars (\$8,435.00), with interest thereon at the rate of Six (6) per cent per annum from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of..... Dollars, plus attorney's fees in the sum of six hundred Twenty & no/100 Dollars.

Dated at Anchorage, Alaska, this 4th day of November, 1949.

/s/ ANTHONY J. DIMOND,
Judge of the District Court.

[Endorsed]: Filed November 4, 1949.

[Title of District Court and Cause.]

MOTION FOR FINDINGS OF FACT

Comes Now the defendant, Laurence Starns, by his attorneys, Hellenthal, Hellenthal and Cottis, and moves this Court that counsel for both the plaintiffs and the defendants be required to submit proposed findings of fact, and the Court enter such findings as it may deem appropriate.

This motion is based upon the records and files herein.

/s/ RALPH H. COTTIS,

For Hellenthal, Hellenthal and Cottis, Attorneys for Plaintiff.

[Endorsed]: Filed November 8, 1949.

[Title of District Court and Cause.]

HEARING ON MOTION TO REQUIRE FINDINGS OF FACT

Now at this time hearing on motion to require findings of fact in cause No. 2-4979, entitled Vern Humphries and Marvin Campbell, Plaintiffs, versus Laurence Starns, Joe Blackard and Glenn Phillips, Defendants, came on regularly before the Court, the plaintiffs not being present but represented by Stanley J. McCutcheon, of their counsel, the defendants not being present but represented by Ralph H.

Cottis, of their counsel. The following proceedings were had, to wit:

Argument to the Court was had by Ralph H. Cottis, for and in behalf of the defendant.

Argument to the Court was had by Stanley J. McCutcheon, for and in behalf of the plaintiff.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, denied motion.

Entered Nov. 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Laurence Starns, one of the defendants above named, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of November, 1949.

/s/ RALPH H. COTTIS,
For Hellenthal, Hellenthal and Cottis, Attorneys for
the Appellant Laurence Starns.

[Endorsed]: Filed November 14, 1949.

[Title of District Court and Cause.]

ORDER

The defendant Laurence Starns through his attorneys having filed herein a motion supported by affidavit praying for an extension of time for filing the record and docketing the appeal in this cause with the Appellate Court; and it appearing to the satisfaction of this Court that good reason exists for such extension, Now Therefore,

It Is Ordered, Adjudged and Decreed that the defendant Laurence Starns have to and including the 90th day from the date of filing the notice of appeal in which to file the record and docket the appeal.

Done in open court at Anchorage, Alaska, the 15th day of December, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed December 15, 1949.

In the District Court for the Territory of Alaska
Third Division
No. A-4979

VERN HUMPHRIES AND MARVIN CAMP-
BELL,

Plaintiffs,

vs.

LAURENCE STARNES, JOE BLACKARD and
GLEN PHILLIPS,

Defendants,

OPINION

McCUTCHEON & NESBETT,
Attorneys for Plaintiffs.

HELLENTHAL, HELLENTHAL & COTTIS,
Attorneys for Defendants.

Defendants have filed objections to plaintiffs' amended cost bill, the controversial items of which are as follows:

“Witness fees:

“Harry Prator, 7 days @ \$6.00 . . .	\$ 42.00
“Jack Barrett, 7 days @ \$6.00	42.00
“Harry Andrews, 7 days @ \$6.00 . .	42.00
“Frank V. Jones, 7 days @ \$6.00 . .	42.00
“Howard Robinson, 7 days @ \$6.00	42.00
“Jack Castlio, 7 days @ \$6.00	42.00
“Dorothy Cavin, 7 days @ \$6.00 . .	42.00
“Eldon Helgelien, 7 days @ \$6.00 . .	42.00

“\$336.00” .

“Expenses incurred in travel for Attorney William Alward from his home in Herington, Kansas, to Anchorage, Alaska, and return to represent plaintiffs in default proceedings held in above case on or about the 13th of May, 1948.....\$857.28

“Mileage fees:

“Vern Humphries, from Kansas City to Anchorage, Alaska, and return for default proceedings and for trial of action @ 10c per mile from Kansas City to Juneau, Alaska, and @ 22c per mile from Juneau to Anchorage, Alaska.\$1,714.16

“Marvin Campbell, from Kansas City to Anchorage, Alaska and return for default proceedings and for trial of action @ 10c per mile from Kansas City to Juneau, Alaska, and @ 22c per mile from Juneau to Anchorage, Alaska.\$1,714.16

“Vern Humphries—days necessarily absent from home—13 days @ \$6.00 per day.....\$78.00

“Marvin Campbell—days necessarily absent from home—13 days @ \$6.00 per day.....\$78.00”

1. The defendants object to the allowance of \$3.00 for marshal's fees for service upon the defendant Glen Phillips, upon the ground that no judgment was entered against that defendant. This objection should be sustained, 20 C.J.S. 453, the text reading as follows: “where part of the defendants are successful and part are unsuccessful, the cost of bringing the successful defendants into Court

should be taxed against plaintiff and not against the unsuccessful defendants." This rule is stated in *Victor v. Adams*, 106 So. 435 (Miss. 1926).

2. The defendants next object to all witness fees above the sum of \$3.00 per day. With respect to this objection it is first necessary to look to the pertinent statutes. Section 25, 48 U.S.C.A. provides:

"In case the law requires or authorizes any services to be performed or any act to be done by any official or person within the Territory of Alaska, and provides no compensation therefor, the Attorney General may prescribe and promulgate a schedule of such fees, mileage, or other compensation as shall be by him deemed proper for each division of the court, and such schedule shall have the force and effect of law; * * *

Sec. 55-11-52 A.C.L.A. 1949 provides that:

"Costs are allowed, of course, to the plaintiff upon a judgment in the district court in his favor in the following cases:

"Fifth, In an action not hereinbefore specified, for the recovery of money or damages, when the plaintiff shall recover fifty dollars or more."

Sec. 55-11-55 A.C.L.A. 1949 provides:

"A party entitled to costs shall also be allowed for all necessary disbursements, including the fees of officers and witnesses, * * *

witness fees for each day a witness is necessarily absent from his usual place of abode by reason of attendance upon court, with traveling expenses at fifteen cents per mile actually and necessarily travelled * * *

On the basis of these statutes, the Attorney General issued a schedule of fees for witnesses, effective February 1, 1945, in which it provided that the witnesses should have:

“For attendance on the district court * * * and for time necessarily occupied in traveling from their residence and returning from the place of trial or hearing, per day, \$3.00.

“In addition to the above, witnesses * * * who attend court * * * at points so far removed from their respective residences as to prohibit return thereto from day to day, shall when this fact is certified to in the certificate of the United States Attorney or order of the commissioner for payment, be entitled to a per diem of \$3 for expenses of subsistence for each day of attendance and for each day necessarily occupied in traveling to attend court and return home * * * \$3.00.”

Accordingly, witnesses are entitled to more than three dollars a day, when they reside too far from the court to return home at night. The cost bill is defective in that it does not set forth the place of residence of the witnesses. *Qualley v. Aitken*, 4 Alaska 291, 296. The court cannot charge defend-

ants with subsistence for the witnesses since they may be able to return to their places of residence at the end of each day. On the basis of the amended cost bill as submitted, the objection must be sustained.

3. The amended cost bill asks that witness fees be allowed each of eight witnesses for a period of seven days. If it is necessary for a witness to be in attendance throughout a long trial he is entitled to witness fees even though the trial was an extended one. *Donato v. Parker Pen Co.*, 7 F.R.D. 148 (1945). In the case of *Qualley v. Aitken*, *supra*, the cost bill contained an item charging witness fees for 30 days attendance; however, this witness had not been subpoenaed and there was no showing in the cost bill as to the number of days he was in attendance, although court records show that he was only called to testify one day. The court allowed witness fees for only one day. If a material witness who testifies is required to remain in attendance throughout the trial such attendance is presumed necessary in the absence of a showing to the contrary, and the per diem may be allowed for each day he was in attendance whether he testified or not. *United States v. Hoxie*, 8 Alaska, 210 (1930). It has also been held that where plaintiff's affidavit that witness was in attendance in court for six days was the only proof offered, allowance of witness fees for six days was proper. *Reidy v. Myntti*, 9 Alaska 639 (1940).

It is now necessary to determine whether the information set forth in the amended cost bill is sufficient to justify allowance of fees for six days for each of the eight witnesses named. The statements in the amended cost bill on this point are brief in the extreme, and do not show that these witnesses were ever in attendance or that any of them testified. The plaintiffs may not be allowed such fees on the basis of the amended cost bill as it now stands.

4. The amended cost bill also contains a charge of \$857.28 as expenses incurred in travel by Attorney William Alward from his home in Kansas to Anchorage and return, to represent plaintiff in default proceedings held in this case, on or about May 13, 1948. The record is barren of anything to show that Mr. Alward ever appeared as attorney for the plaintiffs in this action. Nothing in the law authorizes the payment of traveling expenses of an attorney, who resides in one of the States, to Alaska and return, in order to represent the prevailing party in any suit in the District Court of Alaska. Evidently, the item of costs covering the traveling expense of William Alward is not based upon any claim for attorney's fees. The defendants' objections to this item in the cost bill are sustained.

5. The defendants object to the mileage fees charged for plaintiff Vern Humphries on several grounds. The objection based upon the ground that Humphries is a party to the action is not tenable.

Farno v. Coyle, 75 F. (2d) 692, 695 (1935). The further objections of defendants that plaintiff Humphries did not testify is completely without basis in fact since the record shows that he did testify at some length. The circumstances that plaintiff Humphries testified voluntarily rather than under subpoena, does not deprive him of the right to witness fees. Gallagher v. Union Pacific Ry., 7 F.R.D. 208, 209 (1947); Qualley v. Aiken, *supra*.

The question then arises whether mileage should be allowed for the entire trip or for only a part thereof. A majority of the Federal decisions hold that mileage is recoverable only for such distances as is necessarily traveled by a witness from a point to which a subpoena will run. 20 C.J.S. 479, 480; Kirby v. U. S., 273 F. 391, 396 (9th Cir. 1921). In the year 1926 when the law now embraced in Section 58-3-7 ACLA 1949 was in effect, the Court of Appeals for the Ninth Circuit held that a subpoena issued by the District Court of Alaska will run to any point in the Territory, which is really one Judicial District. Deal v. United States, 11 F. (2d) 3, 8, 9. In this opinion the words "District" and "Territory" appear to have been used interchangeably. Upon appeal, the Supreme Court disagreed, but that disagreement was apparently based upon the theory that the word "District" means something else than the word "Territory" as applied to the Judicial District and Territory of Alaska. Moreover, it is common knowledge that every divisional

branch of the District Court of Alaska has Territorial jurisdiction over the entire Territory or District. Subpoenas issued out of the District Court for the Third Division of the Territory of Alaska at Anchorage, upon proper order, will run in every other Division and must be obeyed by witnesses subpoenaed at points as remote from Anchorage as Ketchikan in the First Division or Barrow in the Second Division, some 1,500 miles apart.

Accordingly, in view of all of the law on the subject, as it existed at the time of trial, it appears that plaintiff Humphries is entitled to mileage from the place where he entered the Territory to his destination at Anchorage, the place where the trial was had, and return, and no more, at the rate of 15 cents per mile.

Defendants further object on the ground that plaintiff Humphries was in Anchorage not only to testify in this case but also in connection with Causes A-5001 and A-5030. Humphries was a party to Cause No. A-5001 and actually testified therein but he was not a party to Cause No. A-5030 nor did he testify therein although subpoenaed by the defendant. The opinions of the Courts are not in harmony on the subject. The matter was considered by the Court of Appeals, Ninth Circuit, in *National Union Fire Ins. Co. v. California C. Credit Corp. & General Ins. Co. of America v. same defendant*, 76 F. (2d) 279 (1935). In those cases the parties had agreed that the testimony for both cases could be taken in the same hearing, and the

witnesses testified only once. The trial court allowed full witness fees and mileage costs in each case. On appeal this was held to be proper. The opposite result was reached in *McKee v. Clark*, 144 P. (2d) 1000. The allowance of full mileage fees and attendance fees in each case appears to be the majority rule. The *Vernon*, 36 F. 113; *Archer v. Fire Insurance Co.*, 31 F. 660; *Young v. Merchants Ins. Co.*, 29 F. 273. The ruling of the Court of Appeals for the Ninth Circuit must prevail in this Court. The objections of defendants here upon the ground mentioned are overruled.

6. With respect to plaintiff Marvin Campbell, it may be pointed out that he did testify as a witness not only in this case but also in Causes Nos. A-5001 and A-5030. The objection made upon the ground of his having testified in the other cases is untenable in view of the decision of the Court of Appeals in *National Fire Insurance Co. v. California C. Credit Corp.*, *supra*. All rulings of the court in connection with plaintiff Vernon Humphries are also applicable to plaintiff Marvin Campbell.

7. Defendants also objected to allowance of attendance and subsistence fees for plaintiffs Humphries and Campbell. Parties to an action may recover witness fees as costs on the same basis as other persons. *Farno v. Coyle*, *supra*. It is to be presumed that both of the plaintiffs were obliged to be in attendance at the trial during the entire time it was before the Court. Witness fees may not be denied by virtue of the fact that witnesses

are not subpoenaed, *Qualley v. Aitken*, supra, or by virtue of the fact that any witness came from a distance of more than one hundred miles. *Gallagher v. Union Pacific Ry.*, supra; *Deal v. United States*, supra. Accordingly, the objections of the defendants to the last two items above-listed on the plaintiffs' cost bill must be overruled.

While it has no bearing on the case at hand, it is worthy of note that the schedule of witness fees issued by the Attorney General and above-referred to has been revised, the new fee schedule being effective October 25, 1949. This revised fee schedule provides for an allowance of \$4.00 per day for attendance and \$5.00 per day additional for subsistence for witnesses who live at a place so far removed as to prohibit their return home from day to day.

Because it appears that the plaintiffs are justly entitled to more of the costs and disbursements claimed than may be approved under the amended cost bill filed, leave is given to plaintiffs to file a second amended cost bill within ten days of the date hereof and the defendant may have five days thereafter within which to file objections. If no amended cost bill is filed, an order may be drawn in harmony with this opinion.

Dated at Anchorage, Alaska, this 30th day of December, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed December 30, 1949.

[Title of District Court and Cause.]

SECOND AMENDED COST BILL

Comes now the plaintiffs in the above-entitled action and file the following Second Amended Cost Bill in the above action:

Marshal's fees for service of process on Laurence Starns and Joe Blackard @ \$3.00.....6.00
Clerk's filing fees in the above action.....\$21.00

Witness fees:

Harry Prator, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Jack Barrett, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Harry Andrews, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Frank V. Jones, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Howard Robinson, witness for plaintiffs in the above-entitled action, having testified in behalf of

plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Jack Castlio, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Dorothy Cavin, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Eldon Helgelien, witness for plaintiffs in the above-entitled action, having testified in behalf of plaintiffs, was necessarily present at Court for the period of 7 days @ \$3.00.....\$21.00

Attorney's fees.....\$620.00

Mileage fees for Vern Humphries, plaintiff in the above-entitled action, whose residence is Kansas City, from the point where said witness entered the Territory of Alaska, to Anchorage, Alasaka, a distance of 850 miles, at 15c per mile, for attendance in the trial of the above-entitled action, and return of the said Vern Humphries to that point where he left the Territory of Alaska on his way to his home in Kansas City, a distance of 850 miles at 15c per mile.....\$255.00

Mileage fees for Vern Humphries, plaintiff in the above-entitled action, whose residence is Kansas City, from the point where said witness entered the Territory of Alaska, to Anchorage, Alaska, a

distance of 850 miles, at 15c per mile, for attendance in the default proceedings had in the above-entitled action, whereby plaintiff was granted an order of default for defendant's failure to appear, and return of the said Vern Humphries to that point where he left the Territory of Alaska on his way to his home in Kansas City, a distance of 850 miles at 15c per mile.....\$255.00

Mileage fees for Marvin Campbell, plaintiff in the above-entitled action, whose residence is Kansas City, from the point where said witness entered the Territory of Alaska, to Anchorage, Alaska, a distance of 850 miles, at 15c per mile, for attendance in the trial of the above-entitled action, and return of the said Marvin Campbell to that point where he left the Territory of Alaska on his way to his home in Kansas City, a distance of 850 miles at 15c per mile.....\$255.00

Mileage fees for Marvin Campbell, plaintiff in the above-entitled action, whose residence is Kansas City, from the point where said witness entered the Territory of Alaska, to Anchorage, Alaska, a distance of 850 miles, at 15c per mile, for attendance in the default proceedings had in the above-entitled action, whereby plaintiff was granted an order of default for defendant's failure to appear, and return of the said Marvin Campbell to that point where he left the Territory of Alaska on his way to his home in Kansas City, a distance of 850 miles at 15c per mile....\$255.00

Witness fees for Vern Humphries, whose residence is Kansas City, Kansas, for the period of 13 days necessarily spent in traveling from his residence to Anchorage, Alaska, the place of the trial of the above-entitled action, time spent in attendance at Court, and return to his place of residence at Kansas City, the period of 13 days at \$6.00 per day.....\$78.00

Witness fees for Marvin Campbell, whose residence is Kansas City, Kansas, for the period of 13 days necessarily spent in traveling from his residence to Anchorage, Alaska, the place of trial of the above-entitled action, time spent in attendance at Court, and return to his place of residence at Kansas City, the period of 13 days at \$6.00 per day.....\$78.00

Vern Humphries—days necessarily absent from his home in Kansas City, Kansas, while attending the hearing on default proceedings as above-mentioned, 10 days @ \$6.00 per day.....\$60.00

Marvin Campbell—days necessarily absent from his home in Kansas City, Kansas, while attending the hearing on default proceedings as above-mentioned, 10 days @ \$6.00 per day.....\$60.00

Total\$2,111.00

United States of America,
Territory of Alaska,
Third Division—ss.

Stanley J. McCutcheon, being duly sworn, deposes

and says: That he is the attorney for the plaintiffs in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said plaintiffs, that the items in the above memorandum contained are correct, to the best of deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

S. J. McCUTCHEON.

Subscribed and Sworn to before me this 9th day of January, 1950.

/s/ VIRGINIA E. JOHNSON,
Notary Public in and for
Alaska.

My commission expires 3/30/53.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

OBJECTIONS TO SECOND AMENDED
COST BILL

Comes Now the defendant Laurence Starns in the above-entitled cause by his attorneys Hellenthal, Hellenthal and Cottis, and makes the following objections to the plaintiffs' second amended cost bill:

1. Defendant objects to the allowance of witness fees beyond an aggregate of \$15.00 each for the following witnesses: Harry Prator, Jack Barrett,

Harry Andrews, Frank V. Jones, Howard Robinson, Jack Castlio, Dorothy Cavin, and Eldon Helgelien. This objection is based upon the ground that plaintiff rested after five days and the said witnesses were no longer required to be in court.

2. In addition to the foregoing general objection, defendant objects to the allowance for witness fees for Jack Barrett and Howard Robinson for more than one day each because defendant is informed and believes that neither of said witnesses was present in court for more than a portion of one day; and that the presence of neither was necessary for more than one day.

3. Said defendant objects to the allowance of \$255.00 for mileage fees for Vern Humphries "from the point where said witness entered the Territory of Alaska to Anchorage, Alaska, a distance of 850 miles, at 15c per mile, for attendance in the trial . . ." This objection is upon the following grounds:

Said defendant is informed and believes that Humphries came to Anchorage via Northwest Airlines from Seattle, and that the point of entry over territorial waters and/or lands was certainly not further from Anchorage than Middleton Island, a distance of 179.46 miles, and may well have been even nearer to Anchorage. Defendant objects to the entire mileage allowance upon the grounds that it does not show specifically the point of entry and is therefore too indefinite. Defendant further objects to all mileage exceeding 179.46 miles, or the sum of \$53.85 for round trip to and from Middleton Island.

Without limiting the foregoing, defendant further objects to the requested allowance insofar as it exceeds 100 miles each way, upon grounds that no order of the court was granted for endorsement on a subpoena which would have validated service of a subpoena upon a witness at a distance of more than 100 miles. Defendant further objects to said requested allowance upon the grounds that the reasoning of the court as set forth in its opinion of 30 December, 1949, with respect to Humphries' mileage allowance is based upon the theory that a subpoena could have been served when the said witness was within three miles of the coast line of Alaska; defendant objects upon grounds that as a practical matter no such service could have been effected until the airplane had actually landed in Alaska; defendant is informed and believes that the said airplane first landed in Alaska at Elmendorf Airbase, Fort Richardson, and therefore objects to all mileage other than the round trip between the City of Anchorage and Elmendorf Airbase. Defendant further objects to the allowance of any return mileage for Humphries upon the ground that his return was in violation of a subpoena issued by this court in Cause A-5030; to encourage the commission of such crimes by the allowance of mileage fees incurred in violation of a court order is neither just, equitable, nor sensible.

4. With respect to the second mileage allowance requested for the witness Humphries, defendant reiterates the foregoing objections and re-alleges

his former objection, namely, that Humphries did not testify in connection with any default proceedings nor was his presence necessary in connection with any default proceeding, since any such proceeding was heard on motion supported by affidavit and any affidavit of Humphries could have been taken without his coming to Anchorage; in fact, defendant does not find that Humphries even filed an affidavit in connection with any such proceeding. Said defendant further objects to such allowance upon grounds that no costs were awarded either party in connection with any default proceeding, and that if Humphries was going to claim costs such claim should have been made a part of the relief requested and granted at that time.

5. Defendant's objections to the first mileage fees for Marvin Campbell are the same as those set forth in paragraph 3 hereof with respect to Humphries excepting that the last sentence of said paragraph is not applicable.

6. With respect to the second mileage fees requested for Campbell, defendant's objections are the same as those set out in paragraph 4 hereof with respect to Humphries.

7. Defendant objects to "witness fees" for Vern Humphries in excess of \$3.00 per day; and if "witness fees" is construed to include subsistence allowances, defendant objects to such allowances because no certificate of the U. S. attorney or order of the commissioner has been presented in accordance with

the attorney general's schedules. Defendant objects to any allowance for time spent in Anchorage beyond the five days during which plaintiffs presented their case and objects to any allowance for traveling time beyond 100 miles and to any allowance for travel time upon the further ground that the length of time spent in traveling is not sufficiently shown. Defendant objects to any allowance beyond five days upon the ground that Humphries stayed for the balance of the trial, not as a witness, but as a party.

8. Defendant's objections to the \$78.00 "witness fees" for Campbell are the same as those in the preceding paragraph with respect to Humphries.

9. Defendant's objections to the allowances requested for Humphries and Campbell in the last two paragraphs of the second amended cost bill are the same as those set forth in paragraph 4 with respect to Humphries' mileage for attendance at "default proceedings."

/s/ RALPH H. COTTIS,
For Hellenthal, Hellenthal & Cottis, Attorneys for
Defendant Starns.

[Endorsed]: Filed January 14, 1950.

[Title of District Court and Cause.]

ORDER

Coming on regularly to be heard the second amended cost bill of the plaintiffs filed herein on January 9, 1950, and the objections thereto of defendants filed herein on January 14, 1950; and the Court having heard the arguments of counsel for the respective parties, and being fully advised in the premises; it is

Ordered that the objections of defendants to the following listed items of plaintiffs' cost bill are sustained and the items will not be included in the costs allowed plaintiff in this action:

1. Mileage fees for Vern Humphries, plaintiff, for attendance at the default proceedings had in the above-entitled action. \$255.00
 2. Mileage fees for Marvin Campbell, plaintiff, for attendance at the default proceedings had in the above-entitled action. 255.00
 3. Witness fees for Vern Humphries, plaintiff, while attending the hearing on default proceedings as above-mentioned. 60.00
 4. Witness fees for Marvin Campbell, plaintiff, while attending the hearing on default proceedings as above-mentioned. 60.00
-
- Total \$630.00

And it is further

Ordered that the second amended cost bill, except as to the items above listed, is allowed and approved and the total amount of the approved items, namely: One Thousand Four Hundred and Eighty-One Dollars (\$1,481.00) may be entered in the judgment in favor of plaintiffs and against defendants heretofore given and rendered in this action on November 4, 1949.

Done by the Court and ordered entered at Anchorage, Alaska, this 24th day of February, 1950.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed February 24, 1950.

In the District Court for the Territory of Alaska
Third Division

Civil Action No. A-4979

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Plaintiffs,

vs.

LAURENCE STARNES, JOE BLACKARD and
GLEN PHILLIPS,

Defendants.

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Appearances:

STANLEY J. McCUTCHEON, and

BUELL A. NESBETT,

McCUTCHEON & NESBETT,

Attorneys at Law,

Appearing for plaintiffs.

RALPH H. COTTIS, and

JOHN S. HELLENTHAL,

HELLENTHAL, HELLENTHAL and
COTTIS,

Attorneys at Law,

Appearing for defendants.

(Whereupon, at 4:15 o'clock p.m., the above-entitled matter came on for opening statements by counsel.)

PROCEEDINGS

The Court: Counsel for plaintiffs may proceed to make an opening statement to the jury.

Mr. McCutcheon: If the Court please, Mr. Helenthal, Ladies and Gentlemen of the Jury.

The plaintiffs will try to show to you during the course of this trial that on or about the 4th of February in 1948 the defendant, Joe Blackard and Larry Starns, the owners of the Panhandle by leasehold right from Anna K. Campbell the true owner, the mother of Marvin Campbell, that Blackard and Starns were in possession of the Panhandle premises by virtue of their lease from Marvin's mother; that about the 4th of February in 1948 they entered into a sublease leasing the restaurant premises of the Panhandle premises to Vernon Humphries and a person by the name of Havens; that that agreement between Starnes and Blackard as leasehold owners of the premises and Mr. Humphries and Mr. Havens required that Mr. Blackard who signed the agreement for himself and Mr. Starns required that he pay for the light and the heat and the water and other obligations that he took on under the agreement; that in return for that Mr. Blackard was to receive six per cent of the gross receipts, which is about 25 per cent of the net profit, or that Mr. Humphries if the

six per cent of the gross amounted to less than \$200 per month that Mr. Humphries was to pay \$200 a month and not less. If you follow me? It is six per cent of the gross but if it fell [3*] below \$200 a month then it was to be maintained at \$200 per month; that there was a restaurant in the premises at the time Mr. Blackard and Mr. Starns took it over; that that restaurant counter was located toward the front of the Panhandle premises; that the Panhandle premises were primarily a saloon or a cocktail bar; that after Mr. Blackard and Mr. Starns took it over they remodeled the place and the tenants that were in the restaurant business sold out to Mr. Humphries and Mr. Havens for the sum of \$2,500; that very shortly after the sale Mr. Havens sold to another party and that party was bought out by Mr. Humphries so that he owned the whole business, he having put up nearly all of the money in the first place; that Mr. Humphries had a stock—an inventory—at the time he went in the restaurant business in the Panhandle of the value of \$1,500; that Mr. Humphries had been in the restaurant business for the railroad feeding railroad employees and when that business was terminated with the railroad after the railroad took it over themselves again Mr. Humphries brought his stock, his inventory, along with him and that the value of it at that time was about \$1,500; and that in addition to his \$1,500 stock he bought several thousand dollars more in stock so that he

* Page numbering appearing at top of page of original Reporter's Transcript.

We will show that he maintained that inventory until he was forced to close down because of Mr. Blackard and Mr. Starns and Mr. Phillips; that the old counter was located to the front [4] of the Panhandle premises up by the window; that at the time they entered into the written agreement that we will introduce in evidence they had several oral agreements or verbal agreements in connection with the same transaction.

One of them was that the counter might be moved in the remodeling of the premises 18 feet to the rear which was agreed to in order to permit Mr. Starns to put his liquor store in the same premise; that it was agreed at that time, however, that the restaurant counter could be seen from the main street for business reasons so that people would know that there was a restaurant in there; and they further had an agreement as to advertising that Mr. Humphries could hang his sign so that it could be seen from the window where the old restaurant sign was hung; that in the remodeling of the premises they moved Mr. Humphries counter completely to the rear of the building and behind the liquor store premises so that the counter couldn't be seen; and in addition to that he had originally agreed with them that he should have as much space as was occupied by the former restaurant owner and that he might put a short "L" on the one single counter so that the "L" would reach out like this permitting him to put four more stools on there; that they didn't permit him to do that and he lost

four stools on the "L" of his counter and one stool off the original counter and that his business suffered accordingly; and that when they remodeled they moved his counter to the rear of the building he protested and saw his attorney, who was myself at the time, and that he [5] finally reached an agreement with Mr. Blackard and Mr. Starns with reference to the counter and with reference to the cost of moving.

This was after the agreement had been entered into at the beginning.

The agreement originally provided that Mr. Humphries must put up a bond under the original agreement. He was to put up a \$3,000 bond to Mr. Blackard and Mr. Starns protecting them against obligations, and it will be shown in the agreement, when we introduce it, when Mr. Humphries protested about moving the counter to the rear of the premises and when he protested that his counter was hidden behind the liquor store in order to make it right with him they agreed that he didn't have to post a bond; that shortly after he was in business they had an argument as to who was to pay for the electricity and that Mr. Blackard refused to pay for it and the City was about to turn it off and in order to protect himself Mr. Humphries was compelled to make a substantial deposit to the City, which was later on credited to Mr. Blackard's debt; that Mr. Blackard never at any time paid for any heat nor for lights nor water as he had agreed to in his original agreement; that shortly after they

had this disagreement Mr. Blackard attempted to put in a taxicab stand, which he later took out again, but in addition to the businesses that were in there which was the bar, the saloon part of it, and the restaurant, and Larry Starn's liquor store, Mr. Blackard [6] put in an airways office—Columbia Air Cargo Ticket Office—took down Mr. Humphries' restaurant sign and put it on the other side of the building and later took it down from there and put it in storage over Mr. Humphries' objection; that they had a considerable argument about that, and that I will develop, between them; that later on, shortly after the violent illwill developed between them, the saloon part of the premises started serving coffee, giving it to their customers at that time of the day when the restaurant enjoyed its biggest coffee trade, which are the morning hours.

We will show that Mr. Humphries expended a very considerable sum of money in remodeling his restaurant premises and in the purchase of equipment—meat saws, grinders, new utensils and a multitude of other items necessary for the restaurant business of the value in excess of \$10,000; that in the beginning, we will show you, they enjoyed a very profitable business and that their business declined and finally faded out completely due to the activity of Starns, Blackard and Phillips.

We will show you that Mr. Humphries and the gentleman who later became his partner, young Mr. Campbell, that they were only in business from the

time of the original agreement until they were compelled to terminate that they were only in business a brief period of time, less than 3 months, and that at the latter part of the period that they were in business Mr. Blackard served a notice on them and told them that their agreement was [7] terminated, and we will show you that there was a provision in the agreement whereby Mr. Blackard could terminate the agreement if some provision of that agreement were violated by Mr. Humphries or Mr. Campbell.

You will also be shown in the agreement that Mr. Humphries could terminate the agreement on 30 days' notice; that Mr. Blackard terminated the agreement, locked up the restaurant, ordered his customers out, took possession of his supplies and stores and put them out on the street; that they sought the advice of counsel and again regained possession of their premises and endeavored to hold it and to do business and to make a living but that Mr. Blackard continued to interfere by changing the locks on the door.

Mr. Humphries had a key to the original lock but Mr. Blackard changed the locks so that he couldn't come in and serve breakfast nor could he serve lunch because at the time the saloon opened until that time he was unable to get into the premises at all.

We will show you that he had a profitable breakfast and lunch trade but that Blackard compelled him to close up at all hours during the time when

the saloon was closed despite the fact that they had an agreement, as a matter of fact, at the original insistence of Blackard and Starns that the restaurant remain open for 24 hours.

Despite that original agreement that it remain open at [8] 24 hours on the original insistence of Blackard and Starns feeling that it would endorse their saloon business operating there 24 hours a day, they nevertheless limited them to business only when the saloon was open. We will show you that that was very damaging to the plaintiffs.

We will show you that Blackard and Starns after a period of time opened gambling games to the rear of the premises right where the restaurant counter was situated so that it was necessary for the plaintiffs' customers to wade through these gambling games and the players seated at the tables in order to get to the stools to eat.

We will show you that that was highly damaging to the plaintiffs' business; that the men who ran the games for Blackard and Starns solicited trade from the counter where plaintiff was serving meals and annoyed the customers and that some of their customers didn't return because of the gambling games that were going on; that some of them were working men and they lost their earnings there, and prior to that time they had eaten regularly in the restaurant and after losing their earnings refused to return at all and were never seen again in the restaurant thereby damaging the plaintiff; that, finally, it became so difficult to keep their business

because of the activity of Blackard and Starns that they were compelled to close down; that when they did they locked their inventory of \$2,000 approximately in one store room and \$1,800 in another [9] store room, plus \$10,000 worth of equipment, locked it up for safekeeping and filed a lawsuit; that Blackard and Starns and Phillips broke into the store room and endeavored to carry some of the provisions away; that it was necessary for plaintiff to call a Deputy United States Marshal to come to the premises to prevent the defendants from carrying away their supplies; that the Deputy United States Marshal compelled them to return the provisions and supplies to the store rooms where they had been locked up; that meat was contained in a sharp freezer; that the defendants took the meat out and endeavored to carry it away; that the meat was returned; that it thawed out and spoiled; that it was returned to the sharp freezer and that Blackard and the other defendants complained to the health authorities then immediately and that the health authorities came down and condemned the meat, but that this was after the restaurant had been closed; that plaintiffs had never been permitted to regain possession of their premises; that the defendants have taken possession of their inventory, their supplies and equipment and leased it out to a third party and that party sold to a fourth party, and that prior to the expiration of their year's agreement the premises burned completely and was a total loss.

And we will show that the defendants were responsible and that they converted—that is, responsible for converting the plaintiffs' goods and equipment to their own use and we expect, Ladies and Gentlemen, when we have shown you that, that you [10] will return a verdict in favor of the plaintiff for the damage that he has sustained.

The Court: Counsel for defendant may make an opening statement.

Mr. Cottis: May it please the Court, Ladies and Gentlemen of the Jury.

To hear the defense of this lawsuit we will have to go into the history of the situation a little bit. Here is what happened: Along in January of 1948, that is, a year ago last January, Hardy and Tibbetts were operating the Panhandle Bar and the Panhandle Restaurant which was situated in the same room as the bar. Joe Blackard, innocent sort of boy, who had been running a filling station, the Service Center, for Russell Swank here in town, decided that he would like to try the bar business and he bought the Panhandle Bar from Tibbetts and Hardy for \$20,000.

To pay that purchase price he had his own savings and he borrowed \$10,000 from Larry Starns and gave him back a chattel mortgage on the equipment in that bar. Then came the question of transferring the lease from Tibbetts and Hardy to Joe Blackard, and Mrs. Campbell, Marvin's mother in Seattle, stated that she would permit Tibbetts and Hardy to transfer the lease to Blackard if he would

pay \$100 more per month rental and it was a new lease and if he would pay an additional \$2,000 for the privilege of getting that assignment of lease, and they [11] did that and they agreed to it and they went in there along about the end of January, 1948. Starns was on the lease—or the assignment of this Tibbetts and Hardy lease because it is a very, very tight lease and there is a provision in there that whoever is running the premises can't sublet any part of the premises without the written consent of Mrs. Campbell.

Starns wanted to put a retail liquor store somewhere in that neighborhood so he made an agreement with Blackard that he would lend him the \$10,000 and he would go on the lease jointly with Blackard and in return he would have a small corner of the premises which he would wall off so that it wasn't connected with the rest of the area at all and he would have his liquor store in there.

They signed the lease and Blackard did considerable remodeling of the bar part of the premises and the restaurant part of the premises and Starns installed his liquor store.

Then, along the first part of February Blackard wanted to find somebody to operate his restaurant. He was new at this business. He had been in the gasoline station business for Russell Swank and he found Verne Humphries who had worked at the Frisco Cafe as a chef and at the railroad mess hall as a chef and he made this written agreement which you will see. It will be in evidence between

him and Humphries. Starns, of course, wasn't in it at all and I don't want you to be misled on that. But you will see the agreement. But Starns had nothing [12] to do with it. He had this little store—a retail package store—and that is all he had to do with the matter. Phillips wasn't concerned in the matter at that time. There was Blackard who made this agreement with Humphries and it was changed a little. Our office drew the agreement originally and McCutcheon and Nesbett put a few changes in it and it was signed in McCutcheon's office and it provides as Mr. McCutcheon has said that Humphries will operate the restaurant in the Panhandle.

That is between Blackard as the owner of the business there and Humphries and Havens, who is now out of it and Campbell is now here in his place, as the operators of the restaurant.

Mr. McCutcheon persisted in calling that agreement a lease agreement because if it is a lease, why, it violates the provision against subletting that is in that master lease. However, I think you will realize when you read the agreement that it is an agreement to employ Humphries there to run the kitchen.

Blackard already had the equipment there. He had the dishes and the pots and the pans and the stoves and the refrigerators and all the things that they do have in restaurants that he had bought for this \$20,000 from Tibbets and Hardy and he needed an operator.

But since the agreement had been originally drawn by us and had been gone over by another law firm with some changes, [13] there are provisions in it to protect Blackard against creditors of Humphries.

You know how it would be if you were a food supplier and somebody who was running a restaurant in the Panhandle Bar and Cafe, for example, called up for a case of corn flakes, you are dealing with the Panhandle in your own mind. You don't know whether it is Joe Blackard who is running the Panhandle and Humphries who is running the restaurant and whether they are partners or it is a corporation or what the dickens arrangement it is, you are a creditor, you bring up the corn flakes and you deliver them and you expect somebody to pay your bill. Now, to protect Joe from having to pay any bills that Humphries incurred in the restaurant business, because it was meant to be a separate operation there, we have put in the agreement various little things such as that Humphries would pay his own expenses as he went along in the operation; he would put up a bond for \$3,000 to protect Joe from any creditors of Humphries who might rely on Joe's credit standing and there are little provisions in there and we approved and the agreement was signed that way that Joe could terminate that agreement any time on 24-hours' notice in writing, and that Humphries could terminate it anytime on 30 days' notice. That would give Joe a chance to find a new restaurant oper-

ator, because the bar business and the restaurant business each hinged on each other. If you had people coming in there because they liked the food they would [14] occasionally buy a cocktail and it helped the food business if you had people in there because they liked the cocktails. They would occasionally get hungry and it helped the restaurant business. It was a thing that had to intermesh—the two businesses had to get along together.

Now, Humphries opened up in there and he started incurring bills and creditors started to heckle Blackard for them. There were grocery bills, there were construction bills, there were all sorts of things and then Humphries started to have something to do with moose meat around there. I am still not clear what it was, but it was, apparently, illegal. Holger S. Larsen of Fish and Wildlife charged Humphries of violating the Alaska Game Laws and Humphries through his attorneys appeared in Commissioner's Court and pleaded guilty to the fact.

Humphries never supplied this bond for \$3,000 which was supposed to be paid. He never paid Joe the percentage of his receipts; never paid him a cent of this 6 per cent percentage that Joe was supposed to get for giving the restaurant concession to Humphries and Campbell.

None of those things was ever done. So we prepared and had served on Humphries a notice detailing the four things that Humphries had failed to do—provide the bond to pay his bills, to comply

with the laws, and to keep a sanitary restaurant in operation there, and for those reasons we as—we stated that the deal between him and between Blackard was terminated 24 [15] hours after he received the notice and we had the Marshal serve the notice.

24 hours expired. Joe had a new operator ready to go in and take over the restaurant. Humphries refused to get out. Joe didn't institute any violent action. He came to see us and we told him to be calm about it that Humphries probably as a practical matter would get out when he was able to get his things in order. And, before Humphries went out finally—the notice was served on April 15th of 1948 and along in May we were still having hearings on this case on the same matter before Humphries finally gave up and got out of the premises.

The complaint in this action asked for an injunction restraining Blackard from interfering with Humphries' occupancy of the premises. We asked for a temporary injunction and that was heard by the Court last May and you will have the file before you in the matter.

At any rate, finally Humphries got out. Then the new owners, as we shall say—the new operator of the restaurant for Joe—had quite considerable expense to go to before he could meet the health standard of the City in the restaurant setup.

Before Joe got through that tight lease that Joe and Starns nominally were on—that tight lease also

provided that they couldn't have any liens incurred on the premises—before Joe was through he had to pay Bliss Construction Company or [16] assign a note to them and he has paid a note to them for \$3,000-odd dollars on a bill that Humphries had run up on restaurant construction with Bliss and had never paid any part of, so that Joe wouldn't violate his own lease and so that Bliss wouldn't file a lien on the premises as he would have to do for his own protection.

Joe had to take over that obligation of Humphries and pay it off and he is still paying on the darn thing.

There are provisions in the lease like that. And, finally, after considerable legal manipulations here in May, why, Humphries and Campbell got out. Now this lawsuit was brought against Starns and Phillips and Blackard. Starns had nothing at all to do with it. Phillips during that period of time was operating the bar, working as a bartender for Joe. And Blackard had the agreement with Humphries.

Blackard, I anticipate that we can prove to you by your satisfaction, never raised a hand to Humphries. He never did anything that wasn't legal all the way through. He never did any subterranean thing like refusing to pay the light bill or anything like that.

The agreement between him and Humphries had these words in it "That Humphries would operate the restaurant and he would operate it in a sanitary

fashion" and so on and that "Blackard would purchase the heat, light and water," not the heat for the stoves for cooking, not the special lighting that Humphries [17] might want installed, not that sort of thing, but the normal heat of the building. In other words Blackard would furnish heat to the building and Humphries' customers wouldn't be cold and Humphries wouldn't have to set up a little individual heater near the stools or anything like that. He would heat the building normally. He would furnish heat, light and water. He would furnish light. He would furnish the same light that he furnished over the bar or over the eating tables or anything else and he did, but not that he would furnish electricity for electric stoves or oil for fuel for cooking stoves, that sort of heat. There is nothing in the agreement about that and you will have the agreement before you.

When Humphries came in with a \$500 bill for electricity for his cooking stoves, naturally, Joe refused to pay it.

Joe never got any payments of any kind out of Humphries during his occupancy of that kitchen. As Mr. McCutcheon outlined he was supposed to pay Joe a minimum of \$200 a month for that concession or six per cent of his gross receipts, whichever it is, and I don't believe that they will be able to show that a penny was ever paid Joe.

He was more than patient with them and he did put them out finally by the most exact and careful legal methods a month or more after he could have

terminated it on his agreement, took from April 15th to well along in May before those boys were finally out of there. He was nice. He did everything [18] that he could to square that thing away. And I ask that when you hear the evidence that you put yourselves in Joe's position. He had mortgaged his future—\$10,000 to Starns and roughly \$10,000 of his savings plus two more thousand dollars borrowed for the assignment of that lease; in addition to that he had remodeled the premises. And he puts a man in the kitchen whose operation of the restaurant is so sloppy, so dirty, so insanitary and whose running up of bills is so exorbitant, grocery bills, electricity bills, every kind of bill you can think of, whose whole operation was such a menace to the whole thing it was hurting Joe's bar business, it was jeopardizing all this money he was in debt for and all his life savings he had put in there, what would you do in that case? You would do your darndest to get these people out of there. You would comply with the law. You would take every step necessary.

You have an agreement. If you aren't satisfied—if Humphries is defaulting, if he is not running a clean restaurant, if he is not complying with the City grading standards for restaurants, if he is doing anything illegal, if he is not paying his bills, anything like that—you can terminate the agreement on 24 hours' notice.

And you are so careful about it that you have the Marshal serve the notice, and I am certainly glad

we did. And then after that Humphries refuses to get out and instead starts a lawsuit against Joe and gets a temporary injunction that was in effect—for a while Blackard was restrained from closing [19] up the premises. He had to keep a watch man there so that Humphries was able to operate 24 hours a day, long after this 15th notice but because there was a temporary restraining order in effect.

Then there were hearings and the temporary restraining order when more facts had been brought to the attention of the Court was lifted then after that time and for the first time Humphries got out of the premises and during all of that period Joe was losing customers, there was good will being dissipated for the restaurant and illwill was being engendered and it took a long, long time after that, as we shall show you, before that restaurant operation was profitable again.

Thank you.

The Court: The trial will be continued until tomorrow morning at 10 o'clock.

Ladies and Gentlemen of the Jury, each time you separate I am obliged by law to give you the admonition that you must not talk about this case among yourselves or with others and you must not listen to any conversation about it from any source and you must not form or express an opinion about it until it is finally submitted to you.

Now, to that I add another admonition which has no force of law but I think you ought to obey

and that is avoid reading the comments of the newspapers and listening to the reports over the radio broadcast about the case. You will be the better [20] able to decide the case upon the evidence you hear in Court if you don't listen to any extraneous matter about it.

Theoretically the newspapers and the broadcasters shouldn't express any opinion about cases before Courts but, as a matter of fact, they sometimes do. Now, they don't want to violate the law but they want to make their talks interesting or their newspaper reports interesting and so they spice up the news with a bit of opinion and it is better for jurors not to listen to that opinion or listen to the news at all.

So you might just as well avoid reading the newspaper articles about the case because you are going to decide the case upon the evidence, not on something printed in the newspapers. And if you don't read the newspapers or listen to broadcasts you won't hear any comment, any expression of opinion, about the merits of the case which you may conceivably hear or read if you read the newspapers or listen to the broadcast.

Court now stands adjourned until tomorrow morning at 10 o'clock.

(Whereupon, at 5 o'clock p.m., Tuesday, June 21, 1949, the trial was recessed until 10 o'clock a.m. the following morning.) [21]

Wednesday, June 26, 1949

The Court: Clerk may call the roll of the jury.

(Jurors' names were called by the Clerk and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Plaintiffs may call a witness.

Mr. McCutcheon: Your Honor, it is necessary for us to call a witness out of turn. We would like to call at this time Mr. Hoff, Deputy United States Marshal, inasmuch as he has to leave at noon for the States.

HERBERT HOFF

a witness, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. McCutcheon:

Q. Mr. Hoff, will you state your name, please?

A. Herbert Hoff, Deputy United States Marshal.

Q. Mr. Hoff, were you Deputy United States Marshal during the months of April and May, 1948?

A. I was.

Q. Calling your attention to the latter part of May in 1948 did you have occasion to visit the Panhandle premises here in Anchorage?

A. I did.

Q. And at whose request did you visit the premises? A. Mr. Humphries. [24]

Q. When did—What did you find when you arrived there?

(Testimony of Herbert Hoff.)

A. I found a truck in the back of the place with a bunch of meat on it and I believe it was about a half case of canned milk. And Mr. Humphries told me they were moving the stuff out and I asked him what the reason was and they said the City Physician had condemned it.

Q. Was there anything else on the truck besides the meat and the milk?

A. Well, I don't remember now. It has been quite sometime ago, but I do know that there was meat and I remember that half case of milk.

Q. What did you do?

A. I told them if they had any more in there to put it back in, that they didn't have any authorization to move that stuff.

Q. You had reference to the canned goods, did you?

A. Yes.

Q. Was the restaurant in operation at that time or had it been closed down?

A. It had been closed down.

Mr. McCutcheon: Your witness.

Cross-Examination

By Mr. Cottis:

Q. When was this, Mr. Hoff?

A. It was about the latter part of May of 1948, about that, I don't remember exact. [25]

Q. And I didn't quite catch the advice that you gave Mr. Humphries?

A. Not Mr. Humphries, I told Mr. Blackard.

(Testimony of Herbert Hoff.)

Q. And Glen Phillips?

A. Yes, that they didn't have no right to move any of that stuff without first consulting Mr. Humphries.

Q. Who was it that was present at that conversation—Blackard and Phillips and yourself?

A. And Mr. Humphries.

Q. Was Mr. Starns present?

A. Not that I remember.

Mr. Cottis: If the Court please, I am going to make the witness my own because of his imminent departure.

The Court: Very well.

Mr Cottis: May I have this marked for identification.

The Court: It may be marked Defendant's Exhibit "A" for identification.

Direct Examination

By Mr. Cottis:

Q. Mr. Hoff, I am going to show you what purports to be a notice dated April 15th and which has been marked Defendant's Exhibit "A" for identification and which contains on the reverse side a statement dated March 10th bearing what purports to be your signature. I ask you whether that is your signature? A. Yes, this is my signature. [26]

Q. Will you read the notice on this side, Mr. Hoff, and tell me whether you recall serving that?

A. Vernon Humphries, Kenneth Havins and Alaska Food Service—

(Testimony of Herbert Hoff.)

Q. Just a moment, you may just read it to yourself.

The Court: Inaudibly.

Q. (By Mr. Cottis): Do you recall serving this?

A. Yes.

Mr. Cottis: May I offer this in evidence, Your Honor?

Mr. McCutcheon: I will hand you a piece of paper and ask you if that is the original of this?

The Witness: Yes, it is.

Mr. McCutcheon: Well, if the Court please, I have no objection to the introduction of both exhibits as I have intended to introduce them myself.

The Court: Counsel for defendants is offering one only now?

Mr. Cottis: I am perfectly willing to offer both of them. I didn't know the other one was in Court.

Mr. McCutcheon: I think it best to introduce the original.

Mr. Cottis: Both should be introduced, I think, because the copy has Mr. Hoff's service of return.

The Court: They may both be introduced. I understand they are identical but I understand the copy shows the return of the witness. Do counsel wish them to go in as two exhibits? [27]

Mr. Cottis: It is immaterial.

Mr. McCutcheon: I think they can go in as one.

The Court: I think they can go in as one because they are so intimately related.

(Testimony of Herbert Hoff.)

Q. (By Mr. Cottis): What was in this pickup truck when you arrived?

A. As far as I can remember there was some meat. I don't remember what it was, whether it was pork or beef, but I know it was meat. But I thought, and I am pretty sure, a half case of milk. I remember Mr. Humphries pointed it out to me.

Q. That is, it was an opened case of milk?

A. An opened case.

Q. Of canned milk, is that right?

A. Yes, sir.

Q. Was Doctor Moon there at that time?

A. No, he wasn't not while I was there. If he was I didn't see him.

Q. Had the case of milk been damaged in any way? A. No, not that I know of.

Q. Did you look inside the case?

A. It was lying opened when I looked at it on the truck. That is what I seen on the truck.

Q. As near as you can recall what time of day was all this?

A. It was after hours because he came down to my home. I would say, if I am not mistaken, it was between 7 and 8 o'clock. [28]

Q. In the evening? A. Yes.

Q. How long have you known Mr. Humphries?

A. Well, let's see, since about the time all this trouble came up.

Q. When you arrived there these items were in the back of the truck, is that correct?

(Testimony of Herbert Hoff.)

A. Yes, sir.

Q. And standing near the truck were Blackard, Phillips and Humphries?

A. No, when I looked at the truck it was just Mr. Humphries and I and then we went in the building and they said Doctor Moon had condemned——

Q. Who said that—Blackard and Phillips?

A. Yes.

Q. And the restaurant was closed at that time?

A. Yes, it was.

Q. Do you happen to know how long the restaurant had been closed then?

A. I don't remember.

Q. When was it that Humphries called your attention to this half case of milk?

A. Well, he showed me the meat.

Q. Was that before you went in and had a talk with Blackard and Phillips or afterwards?

A. It was before. [29]

Q. Was there anything else in the truck that you remember?

A. Well, it has been so long that I don't remember everything.

Q. But you are certain that there was a half case of milk there?

A. That thing seemed to stick out more because Mr. Humphries pointed it out to me.

Q. Do you recall the brand or anything like that? A. No.

(Testimony of Herbert Hoff.)

Q. Was there any conversation regarding the milk when you and Humphries were later with Blackard and Phillips? A. I can't remember.

Q. You don't remember whether there was any conversation about it? A. No, sir.

Q. There was conversation about the meat, however, is that correct?

A. About the meat, yes. I asked Mr. Blackard if he had put the meat in there and he said Doctor Moon had condemned it.

Q. But as nearly as you can recall this half case of milk wasn't mentioned at all.

A. Well, I don't remember, no.

Q. Can you recall any further conversation at that time?

A. No, sir, it has been quite a time ago now.

Q. And you don't remember Mr. Humphries mentioning that half [30] case of milk to Blackard and Phillips? A. No, sir.

Q. In other words what I am getting at, Mr. Hoff, it seems strange, doesn't it, that Doctor Moon would have condemned a half case of unopened milk? I should think that you would have made some remark about it.

Mr. McCutcheon: Object that the question is argumentative.

The Court: Overruled.

Q. (By Mr. Cottis): Explain why no remarks were made about it to Blackard and Phillips?

A. By whom, you mean——

(Testimony of Herbert Hoff.)

Q. By you?

A. Well, I didn't know too much about the case except that he asked me to come down and see what they were doing and I told him that something like that would be civil action so far as I knew, so I went down there and I didn't know if the thing was closed, that they had no rights to take anything out but, as he said Doctor Moon had condemned it—condemned everything that was on the truck.

Q. But no mention was made of that milk to Blackard and Phillips, as nearly as you can remember?

A. I can't remember of it.

Q. Now, you advised Blackard and Phillips that they had [31] better return that stuff to the premises?

A. Yes, I did.

Q. Do you know whether they did it?

A. No, sir.

Q. You don't know or they did not do it?

A. I don't know whether they did or not. You see, I left.

Q. How long were you there altogether, Mr. Hoff?

A. Oh, I would say approximately 15 or 20 minutes.

Q. Were there customers in the Panhandle Bar at the time you were in there?

A. I believe there were some people sitting around there, I don't know whether customers or not.

Q. Do you recall anybody who was present be-

(Testimony of Herbert Hoff.)

sides Blackard and Phillips and Humphries?

A. No, sir.

Q. Was Marvin Campbell present?

A. Yes, he was.

Q. He was? A. I think he was, yes, sir.

Q. Mr. Starns was not present you say?

A. I didn't see him.

Mr. Cottis: No further questions.

The Court: Any further direct examination.

Redirect Examination

(Continued)

By Mr. McCutcheon: [32]

Q. Did you have any conversation with Mr. Blackard or Mr. Humphries about the locks on the store room? A. I believe I did.

Q. Who did you have the discussion with?

A. On the locks you mean?

Q. Yes.

A. With Mr. Humphries—I mean Mr. Blackard.

Q. And what was the nature of that discussion, Mr. Hoff?

A. I asked him who gave him permission to take the locks off?

Q. What did he say to that?

A. He didn't say nothing.

Q. Now with reference to the meat and milk that you testified to, now was there anything else on the truck that you recall?

(Testimony of Herbert Hoff.)

A. Not on the truck that I recall.

Q. Was there anything else there that Doctor Moon was supposed to have condemned?

A. I don't remember, it has been a long time ago now.

Mr. McCutcheon: Very well.

Mr. Cottis: No further question.

Mr. McCutcheon: No further questions.

The Court: That is all. Another witness may be called.

Mr. McCutcheon: Mr. Humphries.

VERN HUMPHRIES

a witness, being of lawful age, and being first duly sworn in [33] the above cause, testified on his oath as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name, Mr. Humphries?

A. Vern Humphries.

Q. Are you married? A. Yes.

Q. Have children? A. 3.

Q. What is your occupation? A. A cook.

Q. How long have you been engaged as a cook?

A. About 24 years.

Q. Now were you in the restaurant business in the months of March, April, May, 1948?

A. Yes, sir.

Q. And where were you then engaged in the restaurant business on those dates?

(Testimony of Vern Humphries.)

A. In the Panhandle Bar and Cafe at 314 4th Avenue.

Q. And on what date did you become engaged in business there? A. On February 4th—5th.

Q. Now, who was the purported owners of the premises at that time? Who did you think was the owner?

A. Mr. Starns and Mr. Blackard.

Q. Now, who is the owner? [34]

A. I later found out Mr. Campbell or Mrs. Campbell, rather, is.

Mr. Cottis: Your Honor, Mr. McCutcheon has asked me to stipulate as to a copy of an agreement. That agreement was drafted and redrafted several times and I wonder if we could have a short recess so that I can compare with the original which is in another one of the Court's files in the Clerk's office.

The Court: Court will stand in recess. How much time is desired?

Mr. Cottis: I would like to have ten minutes. That would be enough.

The Court: All right. Court will stand in recess until 10:23.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. McCutcheon: May I have a moment, Your Honor, I am checking through the file of the previous case. May I see the file that Your Honor has before you?

(Testimony of Vern Humphries.)

If the Court please, in Cause No. A-5001, a copy of an agreement is attached to an amended complaint sworn to by Joe Blackard wherein he certifies an exhibit attached to that entitled "Agreement" to be a true copy of the original. In various other pleadings the same copy appears—the identical copy—and I ask counsel at this time to stipulate that the [35] copy that his client has sworn to to be a true copy and the copy that we have used be introduced.

Mr. Cottis: May it please the Court, in Cause A-5030, which is an appeal from Commissioner's Court, this agreement was introduced in evidence in Commissioner's Court and was received and in the Court's file 5030 in what purports to be an executed copy of the agreement with signatures in ink and that original is a different agreement in several respects from the copy which Mr. McCutcheon is referring to. For that reason I certainly object to the introduction of anything except this original that is in the Court's file.

Mr. McCutcheon: May I be heard further, Your Honor? In the pleading entitled Amended Complaint wherein Joe Blackard swore under oath as follows "That a copy of said agreement is attached hereto marked Exhibit 'A' and made a part of this complaint," I ask counsel if he will stipulate that that agreement may be introduced—that copy?

Mr. Cottis: I will not, Your Honor.

The Court: Very well.

(Testimony of Vern Humphries.)

Q. (By Mr. McCutcheon): Mr. Humphries, in the spring of 1948 did you have occasion to enter into an agreement with Mr. Blackard or Mr. Starns? A. Yes, sir.

Q. In connection with the restaurant premises located in the Panhandle premises? [36]

A. Yes.

Q. And can you tell me what is the nature of that agreement?

A. The nature of that agreement——

Mr. Cottis: I object, Your Honor, the agreement speaks for itself.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): Did you enter into an oral agreement at that time? A. Yes, sir.

Q. Did you enter into a written agreement at that time? A. Yes, sir.

Q. Will you please tell me what the oral agreement was that you entered into?

Mr. Cottis: I object, Your Honor, unless it is established that the oral agreement was subsequent to the written agreement.

The Court: It must be shown that the oral agreement was not incorporated into the written agreement. If there was a written agreement perhaps it could be modified by a subsequent oral agreement but the oral agreement if it was incorporated into a written agreement would not be admissible, and that is my judgment. I think counsel has relied upon a written agreement too and not upon an oral agreement.

(Testimony of Vern Humphries.)

Mr. McCutcheon: Very well.

Q. I hand you a piece of paper and ask you to tell me what it is, Mr. Humphries? [37]

A. It is an agreement.

Q. What is the date on it?

A. The date on it is February 4th, 1948.

Q. And who is it signed by?

A. It is signed by Kenneth Havins, Joe Blackard and Vernon Humphries.

The Court: Signed by——?

The Witness: Joe Blackard, Kenneth Havins and Vern Humphries.

The Court: Is Havins a party to this suit?

Mr. McCutcheon: Beg your pardon?

The Court: Kenneth Havins is not a party to this suit, is he?

Mr. McCutcheon: No, your Honor.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): Now, is that the agreement you entered into at that time?

A. Yes, on the 4th.

Mr. McCutcheon: I offer it in evidence.

The Court: Is there objection?

Mr. Cottis: I would like to see the agreement, Your Honor, before I know whether to object.

The Court: I thought counsel had seen it.

Mr. Cottis: This is a different agreement from the one I asked about. May I inquire from Mr. Humphries? [38]

The Court: You may ask any questions that may

(Testimony of Vern Humphries.)

relate to the admissibility of the document but not engage in cross-examination.

Mr. Cottis: That is what I mean, Your Honor.

The Court: Yes.

Mr. Cottis: Mr. Humphries, this is the agreement that was signed by you and Mr. Blackard and Havins, is that correct?

The Witness: Yes, it is.

Mr. Cottis: Where was it signed?

The Witness: It was signed in Mr. McCutcheon's office.

Mr. Cottis: Did you see Mr. Blackard sign it?

The Witness: Yes, I did.

Mr. Cottis: Did you see Mr. Havins sign it?

The Witness: I believe that I did.

Mr. Cottis: Did you see Mr. McCutcheon sign it as a witness?

The Witness: Yes, I did.

Mr. Cottis: I have no objection to the agreement, Your Honor.

The Court: It may be admitted in evidence as Plaintiff's Exhibit No. 1 and may be read to the jury. What is the date of the agreement?

Mr. Cottis: February 4th.

Mr. McCutcheon: Will Your Honor permit me to take it from the file of the other case? [39]

The Court: Yes, it may be detached from the file and some paper should be placed in the file to indicate that it has been removed so that it may be returned to the file again. This is a file on another case, is it?

(Testimony of Vern Humphries.)

Mr. McCutcheon: Yes, sir. It is entitled "Agreement" and it says as follows:

PLAINTIFF'S EXHIBIT No. 1

"This agreement, made and executed in duplicate at Anchorage, Alaska, this 4th day of February, 1948, by and between Joe Blackard of Anchorage, Alaska, hereinafter referred to as 'Blackard,' and Vernon Humphries and Kenneth Havins known as the Alaska Food Service, hereinafter referred to as 'Humphries.'

"Witnesseth:

"That in consideration of the mutual promises hereinafter set forth, the parties hereto have agreed, and by these presents do agree as follows:

"Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska.

"Blackard agrees to furnish the space, light, heat and water necessary for such operation and to provide the utensils and equipment now on the premises. Humphries represents that he has examined the foregoing and is satisfied therewith.

"Humphries shall operate the foregoing restaurant as an independent contractor and will indemnify Blackard from any liability for debts and obligations incurred by Humphries. To [40] implement this agreement, Humphries shall provide bond in the sum of \$3000.00 for the purpose of protecting

(Testimony of Vern Humphries.)

Blackard from any claims made against Blackard, and arising out of acts or omissions to act on the part of Humphries.

“Humphries shall pay to Blackard on or before the 10th day of each month a sum equal to 6% of gross receipts derived from all operations conducted by Humphries upon the premises or the sum of \$200.00 whichever is the greater.

“Humphries shall keep accurate books of account, showing all receipts from said operations whatsoever nature including airlines business; Humphries agrees to clear all sales through cash register tapes. All books and tapes shall be open to inspection by Blackard, at reasonable times.

“Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage Humphries agrees to endeavor to obtain the highest possible grading thereunder.

“The parties understand that the present restaurant equipment is to be moved to a new location South of its present site. Humphries agrees to bear all expense of moving said equipment and all expenses incurred in furnishing and maintaining additional equipment and utensils as demand may from time to time require. At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory. [41]

(Testimony of Vern Humphries.)

“In event Humphries defaults in the terms of this agreement Blackard may terminate this one year agreement upon 24 hours’ notice. Humphries may terminate this agreement upon 30 days’ notice. Upon termination Blackard agrees to reimburse Humphries for the cost of consumably supplies.

“Neither party may assign his interest hereunder with written consent of other party.

“Humphries shall furnish all labor and supplies necessary to provide service adequate for the demand encountered.

“Witness the hands and seals of the parties date first written.

“Vernon Humphries, Kenneth Havins, Joe Blackard.” It is witnessed by myself, S. A. McCutcheon.

Q. Now, whom did you negotiate with before signing that agreement, Mr. Humphries?

A. With Larry Starns and Joe Blackard.

Q. And how long a period of time did the negotiations last?

A. Over a period of four or five days.

Q. Where was the original draft of that agreement made?

A. At Mr. Cottis’ and Hellenthal’s office.

Q. Where was the final draft signed?

A. At Stan McCutcheon’s.

The Court: For my own information, does counsel for plaintiff believe that the Plaintiff’s Exhibit 1 is identical in text with the copy which is attached

(Testimony of Vern Humphries.)

to the amended complaint? [42] Has any comparison been made of them to see?

Mr. McCutcheon: Yes, Your Honor, the exhibit that Mr. Cottis has attached to his amended complaint.

The Court: No, that isn't the question. There is a copy of what purports to be an agreement between the parties also dated the 4th of February attached to the plaintiff's amended complaint in this action, has counsel compared to see whether that is a correct copy of the instrument which has recently been admitted in evidence and read to the jury and marked Plaintiff's Exhibit No. 1?

Mr. McCutcheon: Yes, sir.

The Court: It is a copy?

Mr. McCutcheon: It is not a copy, sir.

The Court: It is not a true copy?

Mr. McCutcheon: It is not a true copy of the complaint or the agreement attached to the Plaintiff's amended complaint in one action; Mr. Humphries and the defendant's amended complaint in another, they are identical copies as I understand, either Mr. Cottis or myself have the original of that agreement in our office. I propose to check my office and I trust that Mr. Cottis will do likewise when he returns. The only difference between the two agreements is one sentence which provides that, in the copy of the agreement attached to both our complaints, provides that the counter shall be moved 18 feet south of its present location, where

(Testimony of Vern Humphries.)

this agreement provides [43] it shall be moved south of its present location. That is the only difference between the two agreements.

Mr. Cottis: May it please the Court, there are other differences between the two agreements and I don't think they should be gone into at this time.

The Court: Jury is instructed to disregard all of this. I shouldn't have asked counsel in the presence of the jury about this matter, but I simply wanted to try to keep myself straight with the view of by and by preparing instructions. You may disregard all this colloquy between counsel and myself about the copies attached to the various complaints and rely entirely upon the evidence.

Mr. Cottis: May it please the Court further, Mr. McCutcheon just mentioned something about searching his office for the original. I entered no objection because I thought Mr. Humphries had testified that it was the original.

The Court: We had better be careful what is said before the jury by counsel because it is hard for a member of the jury to distinguish what is colloquy between the Court and counsel and what is evidence and the jury must depend upon evidence.

Mr. McCutcheon: I would like to make a motion at this time. I don't think it would be preferable to make it in the presence of the jury.

The Court: All right. The jury may retire until recalled.

Mr. McCutcheon: If the Court please, inasmuch

(Testimony of Vern Humphries.)

as Mr. [44] Blackard has sworn to a copy of an agreement which is in the possession of his counsel, I ask the Court for an order that he produce that copy this afternoon.

Mr. Cottis: I am sorry, Your Honor, I don't follow Mr. McCutcheon's argument. It is true in a complaint filed in a completely distinct cause of action there is attached a copy of a purported agreement. I believe there is nothing in that complaint which states that the original is in our possession.

The Court: Well, if counsel has the original he will present it this afternoon.

Mr. Cottis: Certainly, Your Honor, but I should like to be clear on the record that I made no objection to the copy that is now in evidence because I thought the testimony was clear that it is an original executed copy.

Mr. McCutcheon: Well, if the Court please, it is.

The Court: It is, no doubt about that, it has been signed by all of the parties. The only question now is whether the parties signed some other paper.

Mr. Cottis: May I make a further suggestion to the Court. I have just seen in Mr. McCutcheon's presence an original executed copy of another agreement between these parties of which the copy attached to the complaint is an exact copy. Now, he has the right here in the courtroom——

Mr. McCutcheon: No, Mr. Humphries has it and I propose to introduce it in about two minutes. [45]

Mr. Cottis: May it please the Court, if the

(Testimony of Vern Humphries.)

original executed copy of this second agreement that Mr. McCutcheon is talking about is here in the Courtroom why am I directed to produce it?

The Court: Well, there may be a third one, I don't know. If you have any, Mr. Cottis, it is your duty to produce it.

Mr. Cottis: Yes, Your Honor.

The Court: If you have any other original, whether it is a carbon or not, if it is actually signed by the parties it is your duty to produce it so that all the evidence may be before the Court.

Mr. McCutcheon: May I proceed, Your Honor?

The Court: Yes, you may proceed. Jury may be recalled.

Q. (By Mr. McCutcheon): Mr. Humphries, will you look at the second piece of paper before you?

A. Yes, sir.

Q. Whose signature appears at the bottom of that paper?

A. Joe Blackard, Kenneth Havins, Vernon Humphries, myself, and Stan McCutcheon.

Q. And what is that piece of paper?

A. It is the original.

The Court: Let me see?

Q. (By Mr. McCutcheon): Mr. Humphries, is that the final agreement or is that the [46] signed rough draft that was subsequently corrected and signed? A. That is right, it is a rough draft.

Mr. Cottis: Object to the question as leading and ask that the answer be stricken.

The Court: Overruled.

(Testimony of Vern Humphries.)

Q. (By Mr. McCutcheon): Now, does this agreement before you, that you are now——

The Court: Well, now, I overruled—I denied a motion when counsel asked a leading question but counsel should avoid leading questions.

Mr. McCutcheon: I apologize to the Court if my questions have been leading. I have been just trying to get to the point.

Q. Is the paper that you have in your hand, is it typewritten?

A. Yes, it is, and other writing on it.

Q. Is there other writing on it?

A. Yes, sir.

Q. Is that the final agreement? A. Yes.

Mr. Cottis: Same objection, Your Honor.

The Court: Overruled.

Q. (By Mr. McCutcheon): Is that the final agreement? A. Yes, it is.

Q. Was an agreement identical with that subsequently signed? A. Yes, sir. [47]

Q. Now, is that the agreement Mr. Cottis is talking about? A. Yes, the first one here.

Mr. Cottis: I object, Your Honor, because Mr. Humphries cannot know what I am talking about.

Mr. McCutcheon: Well, if the Court please, if this is the agreement that he said he saw in my file and insisted on being produced and I am trying to get it in and now he is objecting to it.

The Court: The objection is sustained to the question. It is too indefinite to say “Is that the

(Testimony of Vern Humphries.)

agreement that counsel or Mr. Cottis was asking about?"

Mr. McCutcheon: Very well, sir.

Q. Now, is that agreement that you have before you together with the handwritten interlineations, does that constitute the final agreement?

A. Yes, sir.

Mr. McCutcheon: Offer it in evidence.

The Court: It may be shown to counsel.

Mr. Cottis: I object, Your Honor. Well, before objecting may I inquire of the witness about that agreement?

The Court: Yes. Has counsel seen this paper?

Mr. Cottis: Just from a distance.

The Court: Counsel may read it. Take enough time to read it and see what it contains.

Mr. Cottis: Thank you, Your Honor. And may I have plaintiff's [48] exhibit No. 1?

The Court: Yes. Just see if that is marked Plaintiff's Exhibit No. 1?

Mr. Cottis: Yes, Your Honor.

The Court: I had better repeat the rule—All persons who may be witnesses are required to remain outside the Court Room until called as witnesses.

Mr. Cottis: Mr. Humphries, in whose custody is this unmarked document or in whose custody has it been to this time—this document which Mr. McCutcheon has offered in evidence now?

The Witness: It has been in—I don't know for sure what file it was taken out of just then, I

(Testimony of Vern Humphries.)

couldn't swear to that, but I do know that it is the original what we agreed upon.

Mr. Cottis: Just answer my question.

The Court: Where has it been?

The Witness: It has been in the files here.

Mr. Cottis: In whose files?

The Witness: It has been in our file, I am sure.

Mr. Cottis: That is, in your own file?

The Witness: I don't have—in McCutcheon's file.

Mr. Cottis: In McCutcheon's file?

The Witness: Yes.

Mr. Cottis: Continuously since it was executed?

The Witness: To all my knowledge, yes.

Mr. Cottis: And is that the source from which it was [49] produced at this time?

(No response.)

Mr. Cottis: How did you acquire possession of it just now?

The Witness: Mr. McCutcheon handed it to me.

Mr. Cottis: I notice that there are several interlineations on this document, Your Honor, could I have it marked for identification so that I can refer to it.

The Court: Mark it for identification as Plaintiff's Exhibit 2.

Mr. Cottis: Mr. Humphries, I show you this document which is marked for identification as Plaintiff's Exhibit 2 and I invite your attention to the interlineation of the word "substitute" up here in pencil and ask you who wrote that word in?

(Testimony of Vern Humphries.)

The Witness: To be truthful with you, I could not tell you.

Mr. Cottis: Can you tell me when the word was written in?

The Witness: Yes, it evidently was wrote in the night that we entered in this first agreement and then I taken it over to compare it with Larry Starns' agreement and we arrived on these other minor little changes and came back over immediately for a new copy to be written.

Mr. Cottis: Then it was written, you testified, on the 4th day of February, 1948?

The Witness: Yes, sir. [50]

Mr. Cottis: How do you know, did you see it written in——

The Witness: Yes, sir, I did.

Mr. Cottis: And whom did you see write the word?

The Witness: I can't recall this word up here at the top of, when it came in there.

Mr. Cottis: But you do recall seeing somebody write the word in?

The Witness: This was kept in my possession for a few days afterwards or I picked it up. When Kenneth Havins was sent out my nephew was going to be a party of the contract, which didn't go through.

Mr. Cottis: Just stick to the question, Mr. Humphries, can you recall who wrote that word on the paper and when it was written?

(Testimony of Vern Humphries.)

The Witness: No, I can't.

Mr. Cottis: Can you recall who drew this line which goes from the word "substitute" down to over the word "Havins"?

The Witness: No, I cannot.

Mr. Cottis: Now, can you tell me who wrote in ink these words "Albert F. Humphries"?

The Witness: Yes, I can.

Mr. Cottis: All right, who wrote those?

The Witness: It was the attorney in——.

Mr. Cottis: Will you repeat your answer?

The Witness: We were going to take and make a new contract [51] and I didn't have in my possession down at the restaurant the original one that we had retyped. I had it down home. So I had this carrying it around in my pocket. I should have thrown it away. And I went up to Stan McCutcheon's office and asked for Albert Humphries—for a contract to be drawn with his name on it and a few minutes later called back and told them to cancel it out.

Mr. Cottis: Well, now, was it at the time that you asked them to draw the contract with Albert Humphries' name on it that those words were written there?

The Witness: What words?

Mr. Cottis: The words "Albert F. Humphries?"

The Witness: Yes, Albert F. Humphries was wrote. But this was almost a month after the contract was written.

(Testimony of Vern Humphries.)

Mr. Cottis: Who wrote the words?

The Witness: Who wrote the words "Albert F. Humphries"? Albert Humphries, I gave it to him and he took it over to Stan McCutcheon's office and left it with the attorney in Stan's place.

Mr. Cottis: And then Albert F. Humphries put those words on it?

The Witness: He wrote his name on there I am sure.

Mr. Cottis: That is, you did not see him write it?

The Witness: I did not write that word.

Mr. Cottis: You know his handwriting, do you?

The Witness: Not for sure.

Mr. Cottis: Is he a relative of yours?

The Witness: He is a nephew of mine.

Mr. Cottis: Now, Mr. Humphries, you state the reason these copy was sent over for those changes was that the original was at your house and you happened to have this in your pocket?

The Witness: Yes.

Mr. Cottis: Had this been signed at that time?

The Witness: Yes, this had been signed.

Mr. Cottis: Now, where is the original that you had at your house at this time?

The Witness: It was brought up and placed up to the lawyer's office.

Mr. Cottis: It was what?

The Witness: I brought my original paper at one time or this year.

Mr. Cottis: Excuse me, would you read his other answer back.

(Testimony of Vern Humphries.)

(Previous two questions and answers read.)

Mr. Cottis: Now, Mr. Humphries, you stated at the time this was sent over to Mr. McCutcheon's office to have changes made it had been signed by all the parties who were then parties to it, is that right?

The Witness: I don't quite—— [53]

Mr. Cottis: Well, at that time it had been signed by yourself, by Vern Humphries?

The Witness: Yes.

Mr. Cottis: And it had been signed by Kenneth Havins?

The Witness: Yes.

Mr. Cottis: And it had been signed by Joe Blackard?

The Witness: Yes.

Mr. Cottis: And it had been witnessed by Stan McCutcheon?

The Witness: Yes.

Mr. Cottis: Now, the reason you sent this over to McCutcheon's office was that the original was at your house at that time?

The Witness: Yes, if you are referring to this signature up at the top.

Mr. Cottis: I am referring to the original copy—I take it, by "original copy," first of all, you mean the original typewritten copy—the first copy off the typewriter?

The Witness: No, I mean there was three copies made and I had one of them.

(Testimony of Vern Humphries.)

Mr. Cottis: That was at your house?

The Witness: That was at my house, yes.

Mr. Cottis: That was a signed copy?

The Witness: I had with these words in here.

Mr. Cottis: With the signature on it?

The Witness: With the signature on it. [54]

Mr. Cottis: And then you also had this copy with this signature on it?

The Witness: Yes.

Mr. Cottis: Now, where was the third executed copy, do you know?

The Witness: Joe Blackard had one.

Mr. Cottis: And that takes care of the three of them, then?

The Witness: No, Kenneth Havins had one.

Mr. Cottis: Then, I see, there were four that were signed and not three?

The Witness: No, there was Kenneth Havins, Joe Blackard each one I know had a copy.

Mr. Cottis: But you had two executed copies, didn't you?

The Witness: This here was signed and later agreed upon with Mr. Larry Starns of the things that go——.

Mr. Cottis: Just answer the question, Mr. Humphries.

Mr. McCutcheon: He is answer the question you asked him; let him answer it.

Mr. Cottis: I asked him if he had two executed copies?

(Testimony of Vern Humphries.)

The Witness: This is what we wrote in to be the original one that we intended—ended up with.

Mr. Cottis: At the time you sent this over to McCutcheon's office to have the words Albert F. Humphries, you had in your possession or control two executed copies, did I understand you [55] correctly?

The Witness: That is right, this was supposed to have been thrown away. I just carried it in my pockets.

Mr. Cottis: This one was supposed to have been thrown away?

The Witness: Yes, because we had retyped these following words in here.

Mr. Cottis: Now, what happened to the other executed copy that you had in your possession and which at that time was at your home?

The Witness: Well, I can only—only one of two things could have happened to it.

Mr. Cottis: Do you know what happened to it?

The Court: Wait a minute.

The Witness: My house caught fire last year and I had lots of my papers in my house. It caught fire three times in one night. I could have had the same. I had one still in my safe there that this was off of and had them produce this to Stan McCutcheon or I had produced this or it had been left there and never been picked back up and it became the part. That is as near as I can answer it.

Mr. Cottis: In other words, your answer is that

(Testimony of Vern Humphries.)

other original that you had burned so far as you know?

The Witness: I can't even swear to that.

Mr. Cottis: Well, have you seen it since the fire?

The Witness: No, I seen one in one of the files when I was looking over the Court record the other day.

Mr. Cottis: That is in one of Mr. McCutcheon's files or one of the Court's files?

The Witness: In one of the Court's files.

Mr. Cottis: Now, back to these interlineations, Mr. Humphries. The next one that I see is an X and then the word "commence." Was that in there at the time you sent it over to Mr. McCutcheon's office to have Albert F. Humphries' name added?

The Witness: Yes, I guess it was.

Mr. Cottis: Who put that word "commence" on there?

Mr. McCutcheon: If the Court please, I don't like to interrupt counsel but that is the rough draft of the complaint that you have attached to your complaint.

Mr. Cottis: That action has nothing to do with this action, Your Honor. This has been offered as an exhibit and I would like to know how authentic it is.

The Court: All right, go ahead.

Mr. Cottis: Mr. McCutcheon, do you know who wrote the word "commence" in there?

Mr. McCutcheon: No.

(Testimony of Vern Humphries.)

Mr. Cottis: I am sorry, did I say "Mr. McCutcheon?" I am sorry. Mr. Humphries, do you know who wrote the word "commence" in there?

The Witness: Right off hand I couldn't tell you, no. [57]

Mr. Cottis: Was that word written at the time you sent the document over to Mr. McCutcheon's office?

The Witness: It could have been and it could'nt have been. I couldn't swear to that word. I don't know the handwriting. I can't answer.

Mr. Cottis: But at that time you are sure that that copy of the contract had been signed by all parties?

The Witness: Yes, sir.

Mr. Cottis: Now the other signed copy that you had in your safe at home that had been signed by all parties, too, as I understand it?

The Witness: Yes, sir.

Mr. Cottis: And did that have the word "commence" on it, too.

The Witness: I haven't seen it for a period of 15 months. That is kind of hard answer to answer.

The Court: May I see that? May I see Plaintiff Exhibit "A?" Counsel may proceed.

Mr. Cottis: I am sorry, I didn't hear the Court.

The Court: Counsel may proceed.

Mr. Cottis: Mr. Humphries, you don't recall whether that word was on the copy that was on your safe in your home?

(Testimony of Vern Humphries.)

The Witness: Pardon?

Mr. Cottis: You don't recall whether the word "commence" was on the copy in your safe at home, is that your answer? [58]

The Witness: As I have stated before, I couldn't remember it word for word over 15 months.

Mr. Cottis: But you are sure that there were only three signed copies to begin with?

The Witness: Well, I know positively that Joe Blackard had one and Kenneth Havins had one and I had one.

Mr. Cottis: Do you recall how many copies you signed?

The Witness: Not to be real honest about it, but I do know that we signed three of them.

Mr. Cottis: But to be real honest then there might have been six that were signed?

The Witness: No.

Mr. Cottis: Four?

The Witness: No, I believe—I am pretty positive that there was only the three that was signed.

Mr. Cottis: Then of the three that was signed you had two in your possession, is that right?

The Witness: Well, we first had made out this agreement was quickly written up and after we signed it we went back to the Panhandle, Joe Blackard, Kenneth Havins and myself, and met with Larry Starns and after talking we agreed on how many feet I was to go back in the back and we agreed on 18 feet and these words were writ in and

(Testimony of Vern Humphries.)

within 30 minutes we were back over there and this contract was retypewritten and we signed, I know, three copies with these very words into it. [59]

Mr. Cottis: That was on the night of February 4, 1948, is that correct?

The Witness: That is right.

Mr. Cottis: And, again, who was present?

The Witness: Joe Blackard, Kenneth Havins and Stanley McCutcheon. You mean at signing these?

Mr. Cottis: At the discussion in the Panhandle?

The Witness: That was Joe Blackard, Kenneth Havins and Larry Starns back in the back office room.

Mr. Cottis: And that was on the night of February 4, 1948, the same date that appears on that contract, is that correct?

The Witness: It is somewhere in there.

Mr. Cottis: You are sure, for example, that Joe Blackard was there?

The Witness: Yes.

Mr. Cottis: And you are sure that Larry Starns was in there?

The Witness: Yes, he was getting ready to leave town. He was in a big hurry.

Mr. Cottis: There is just no doubt in your mind, Mr. Humphries, that Mr. Starns was present on that night of February 4th?

The Witness: No doubt. That was no doubt.

Mr. Cottis: See if I follow this thing, then, you

(Testimony of Vern Humphries.)

and [60] Joe and Havins and McCutcheon in McCutcheon's office signed the document?

The Witness: We first had made one in your office?

Mr. Cottis: Which was never signed, is that correct?

The Witness: That is right.

Mr. Cottis: Now, first you made out a document in our office and that was never signed, then you and Havins and Blackard and McCutcheon were present at the original signing of what you now say was a draft of an agreement at McCutcheon's office, is that right?

The Witness: Yes.

Mr. Cottis: And that was during the day of February 4, 1949?

The Witness: It was in the evening.

Mr. Cottis: In the evening?

The Witness: Yes, sir. We left your office somewhere at closing time, I remember something like you were in a hurry to get out and I know I called Stanley from his home.

Mr. Cottis: Later at the evening you were at the Panhandle premises, is that your testimony?

The Witness: Yes, sir.

Mr. Cottis: And that time you sent this document which is marked for identification Plaintiff's Exhibit 2 over to McCutcheon's office to have the name "Albert F. Humphries" added?

The Witness: That was in a period of about, I

(Testimony of Vern Humphries.)

would say [61] 30 days had elapsed then when Kenneth Havins was selling out.

Mr. Cottis: Oh, then, that was not on the same day?

The Witness: About Humphries?

Mr. Cottis: Yes.

The Witness: No, it was about, I would, I would say, from two weeks to a month. I couldn't exactly recall the exact date, but I know I have the paper signed by Havins the day he sold out to me.

Mr. Cottis: Then the words "Albert F. Humphries" were added on there maybe a month later, you aren't—

The Witness: Up at the top I am sure it was a month later.

Mr. Cottis: Would the word "commence" have been written on about a month later, too?

The Witness: I can't just recall that, Mr. Cottis.

Mr. Cottis: Well, I am sorry to have interrupted the train of thought here. You all signed the document up in McCutcheon's office and then you went over to the Panhandle bar, is that right?

The Witness: Yes, sir.

Mr. Cottis: And then you had a further conference about the agreement?

The Witness: Yes, sir.

Mr. Cottis: And this was on the night of February 4, 1948? [62]

The Witness: Yes.

Mr. Cottis: And Larry Starns was present at that conference?

(Testimony of Vern Humphries.)

The Witness: Yes.

Mr. Cottis: Now, after that conference——

The Court: Counsel is standing between Mr. McCutcheon and the witness.

Mr. Cottis: I am sorry, Your Honor. After that conference, Mr. Humphries, you went back over to Mr. McCutcheon's office?

The Witness: I didn't follow you there?

Mr. Cottis: After the conference did you go back over to Mr. McCutcheon's office?

The Witness: Yes, we did.

Mr. Cottis: Who went over there?

The Witness: Joe Blackard, Kenneth Havins and myself.

Mr. Cottis: Leaving Starns at the Panhandle, is that right?

The Witness: That is right.

Mr. Cottis: What portion of the Panhandle was Starns in when you had this conference?

The Witness: He was on the restaurant side where they had a little office.

Mr. Cottis: Was his liquor store open then?

The Witness: No, they had just had bought out Tibbetts [63] or something.

Mr. Cottis: None of the property was open to the public at that time?

The Witness: The bar was just being closed up, something like that, getting ready to remodel.

Mr. Cottis: What occurred with reference to this agreement after you and Mr. Blackard and Mr.

(Testimony of Vern Humphries.)

Havins went back over to Mr. McCutcheon's office?

The Witness: We had it retyped.

Mr. Cottis: I see.

Mr. McCutcheon: I don't like to interrupt counsel, Your Honor, but I am wondering if he is still cross-examining for the purpose of testing admissibility of this exhibit?

Mr. Cottis: I am merely inquiring further about the exhibit. You had it retyped that evening of February 4?

The Witness: To my best of knowledge, yes, sir. I know we went back over there and I am sure we signed it that evening.

Mr. Cottis: And you are sure that it was retyped that evening?

The Witness: Why, certainly.

Mr. Cottis: Was there a stenographer in Mr. McCutcheon's office that night?

The Witness: No, sir, Mr. McCutcheon typed it himself.

Mr. Cottis: Mr. McCutcheon typed it himself?

The Witness: Yes, sir. [64]

Mr. Cottis: Do you remember how many copies he typed?

The Witness: I know that it was three. I know that each one of us had one. Whether he kept one——.

Mr. Cottis: That is, you had one, Havins had one, Blackard had one?

The Witness: That is right.

(Testimony of Vern Humphries.)

Mr. Cottis: None for Starns, of course?

The Witness: Not that I know of, it could have been.

Mr. Cottis: Well, were three of that new agreement signed, Mr. Humphries?

The Witness: All three of them?

Mr. Cottis: Yes.

The Witness: Yes.

Mr. Cottis: That is, the new agreement that Mr. McCutcheon typed up at that time was signed by all parties?

The Witness: Yes, Mr. Starns said whatever Joe said was o.k. with him.

Mr. Cottis: I see, but that new agreement that Mr. McCutcheon put in his typewriter that night was signed by you and Blackard and Havins, is that right?

The Witness: That is right.

Mr. Cottis: And that included the changes that are incorporated and penciled into this Plaintiff's Exhibit No. 2 for identification?

The Witness: I know the ink was wrote in. [65]

Mr. Cottis: The ink was typed in, is that right?

The Witness: That is right.

Mr. Cottis: And that was signed and then will you tell me what happened to that agreement?

The Witness: Well, I couldn't tell you what Mr. Blackard did with his or what Mr. Havins did with his. I told you a minute ago what to the best of my knowledge happened to mine.

(Testimony of Vern Humphries.)

Mr. Cottis: At that time you were talking about your copy of this Plaintiff's Exhibit 2 for identification, were you not?

The Witness: Will you speak that again, please, I don't quite get you?

Mr. Cottis: Read the question.

(Question read.)

The Witness: I still don't quite understand, I don't believe. I have two copies here and I might be confused as to which one you are referring to right now. I don't quite follow you, which one are you referring to?

Mr. Cottis: This one is in evidence, Mr. Humphries, so I don't think we care about that right now. I am referring to this which is marked on the back "Plaintiff's Exhibit No. 2 for Identification." I am referring to that.

The Witness: Yes, sir.

Mr. Cottis: Now, will you answer the question?

The Court: Better ask the question again.

Mr. Cottis: Mr. Humphries, sometime ago you stated—— [66]

The Court: You had better ask him if he so stated?

Mr. Cottis: Mr. Humphries, did you not state sometime ago that another executed copy of Plaintiff's Exhibit 2 was in your house and you think was destroyed by fire?

The Witness: Yes, sir.

(Testimony of Vern Humphries.)

The Court: Counsel was referring to that paper before any changes were made in it?

The Witness: No. No paper was in my house before it was changed. The paper that was in my house was the changes made in this contract.

Mr. Cottis: It had all those interlinations in?

The Witness: Yes, sir.

Mr. Cottis: Mr. Humphries, you stated that the contract was originally signed in the form of Plaintiff's Exhibit 1, this document here, at about 7:00 o'clock in the evening on February 4, did you not.

The Witness: Yes, sir.

Mr. Cottis: And then the three of you went over to the Panhandle Bar, is that right?

The Witness: That is right.

Mr. Cottis: And discussed the deal further with Mr. Starns?

The Witness: That is right.

Mr. Cottis: And then went back to Mr. McCutcheon's office where he retyped the contract to include these interlineations [67] which appear on Exhibit No. 2, is that right?

The Witness: Yes, sir, with all this in here.

Mr. Cottis: Yes. Now, how did the other copy of Exhibit No. 2 get down to your house in the interim?

The Witness: Well, I had a copy, Joe Blackard just like he has got it in his file there with the same thing that reads in here.

Mr. Cottis: Exhibit 1 was signed about 7:00

(Testimony of Vern Humphries.)

o'clock in the evening of February 4th, is that right?

The Witness: Pardon?

Mr. Cottis: You stated that Exhibit 1 was signed about 7:00 o'clock in the evening on February 4th?

The Witness: No, it was a little bit before that, I would say. We left your office about five o'clock and we went right over there.

Mr. Cottis: And changed the agreement at McCutcheon's office?

The Witness: Yes, I stated to you that I wouldn't sign that until I got my attorney's o.k.

Mr. Cottis: So it was signed, say, between six and seven o'clock on that night?

The Witness: Yes.

Mr. Cottis: Now, that first signing was in the form of Plaintiff's Exhibit No. 1, the one without the interlineations?

The Witness: That was the first signing, yes.

Mr. Cottis: Then you state that you proceeded to the Panhandle and conferred with Larry Starns?

The Witness: Yes, and also taking up the idea as we went over there how much space, that I was figuring on an air line coming in there and I said "How much space?" and "Draw me a plan of what this is going to be?" and they drew me a plan and we discussed it then and Larry said the best he would want would be 18 feet.

Mr. Cottis: So you were over there for a fairly long time during that discussion, were you?

(Testimony of Vern Humphries.)

The Witness: I would say half an hour, might have been 45 minutes, it wasn't too long.

Mr. Cottis: And then you proceeded right back to Mr. McCutcheon's office?

The Witness: That is right.

Mr. Cottis: Now, Mr. Humphries—

The Witness: I will take that statement back. I do believe that I called Stan again on the telephone. Now, I am not too positive but I do know I got him back down there to rewrite the paper again.

Mr. Cottis: And then after he had come back down you went over to his office?

The Witness: Yes, sir, he either waited there or I called him up, anyway we got in connections.

Mr. Cottis: How long a time interval do you recall [69] elapsed?

The Witness: Well, as I stated, I don't believe it was more—it could have been an hour, but I don't think so.

Mr. Cottis: Mr. Humphries, did I correctly understand you to testify earlier that the original—that another executed original of Plaintiff's Exhibit No. 2 was at that time in the safe at your house?

The Witness: At that time, no, sir.

Mr. Cottis: I see, then I am wrong.

The Witness: But you were talking about Albert Humphries, how his name came on there and I so stated the original one we type of this I had

(Testimony of Vern Humphries.)

was at my house, which was thirty days later and I carried this in my pocket and darn near wore it out.

Mr. Cottis: When were these interlineations which appear in ink above the fourth paragraph from the bottom, when were they made?

The Witness: They were made the same night, the words "approximately 18 feet."

Mr. Cottis: Who made those?

The Witness: Oh, I would not swear, it was one of us four.

Mr. Cottis: Was that when you were at the Panhandle or when you had returned to McCutcheon's office?

The Witness: No, it was done at the Panhandle.

Mr. Cottis: That was done at the Panhandle after the [70] document had been signed the first time and before you returned to McCutcheon's office?

The Court: I wish both of counsel would come to the bench with the reporter.

It is perfectly obvious to me what happened. The Witness is telling the truth about this thing and the document which is attached to Blackard's complaint, and which he sworn, was the final one and Blackard must know it and everybody must know it, and what is the use of——

Mr. Cottis: I think those are interlineations without Blackard's knowledge in this matter and I think that our girl——

(Testimony of Vern Humphries.)

The Court: How did Blackard then ever get a copy of that and put it in his own complaint?

Mr. Cottis: Because our stenographer would have copied it from the copies that were already in the Court's files over here, which are the erroneous copies.

The Court: I see. All right, what copy was in the Court's file at that time?

Mr. Cottis: It would have been the one in the eviction, which was the first.

The Court: Where is the file in the eviction action?

Mr. Cottis: It is 5030.

The Court: That is the one out of which we took—this is the one out of which we took Plaintiff's Exhibit 1, isn't it? [71]

Mr. Cottis: Yes.

The Court: That doesn't contain the interlineation.

Mr. Cottis: I know, that is what I am getting at.

The Court: How did—how could your stenographer copy a thing——

Mr. Cottis: It is our contention that this is our copy. I see what Your Honor means.

The Court: It is up to the jury to decide it, but, candidly, I don't believe a word of it. I think you had better dig up this original, wherever it is. Blackard must have it or somebody must have it. That is all, you may proceed with your examination.

Mr. Cottis: Mr. Humphries, you are sure that

(Testimony of Vern Humphries.)

Mr. McCutcheon himself retyped that agreement and typed in what is written in pen there?

The Witness: Yes, sir.

Mr. Cottis: And that retyped copy was then re-executed by all parties?

The Witness: Well, each one of us all had a copy of it, yes, sir.

Mr. Cottis: And everybody signed it, did they?

The Court: Do you know what "executed" means?

The Witness: Well, I would like to know what it means?

The Court: Don't you know what it means?

The Witness: I think I do. [72]

The Court: What does——

The Witness: It means that it was our agreement then—our signing.

The Court: All right, that is right.

Mr. Cottis: Everybody signed that new type-written copy of that agreement?

The Witness: Yes, sir.

Mr. Cottis: In your presence?

The Witness: Yes, sir.

Mr. Cottis: And that was at McCutcheon's office?

The Witness: Yes, sir.

Mr. Cottis: Mr. McCutcheon signed as witness?

The Witness: Yes, sir.

Mr. Cottis: Now, what happened to the agreements that had been signed between six and seven o'clock that night that are marked here Plaintiff's Exhibit No. 1?

(Testimony of Vern Humphries.)

The Witness: Mr. Blackard has one to my knowledge and Mr. Havins. I don't know what could have happened to them but I stuck this one in my pocket.

Mr. McCutcheon: May I interrupt counsel for a moment. I wonder if the Court would permit a short recess. We have run over our recess period and I am wondering if we couldn't have a brief recess.

Mr. Cottis: I think I will be just another minute, Your Honor, with the Court's indulgence. [73]

The Court: All right.

Mr. Cottis: Mr. Humphries, these interlineations were written at the Panhandle Cafe that evening while the four of you were conferring?

The Witness: Yes, sir.

Mr. Cottis: Were they written in all copies at that time?

The Witness: I don't think so—yes, come to think of it, they were.

Mr. Cottis: In all the copies so that they would all be identical?

The Witness: No, I know that—wait a minute, no, I don't believe so. I think we just taken the one back over there.

Mr. Cottis: So this was the only copy with the interlineation in it?

The Witness: That was wrote in before it got taken back for recopying.

Mr. Cottis: You are sure then that this is the

(Testimony of Vern Humphries.)

only copy that has the interlineations written in by hand?

The Witness: Now, that—that was 15 months ago, but to my knowledge that this was the only one that was wrote in.

Mr. Cottis: Where did you stand when you were writing them in at the Panhandle, do you recall?

The Witness: Larry Starns' desk.

Mr. Cottis: And they are written in on that copy in your handwriting? [74]

The Witness: No, it isn't my handwriting.

Mr. Cottis: Do you recall now who wrote those interlineations in?

The Witness: I wouldn't be positive of it.

Mr. Cottis: But one of the five of you or one of the four of you?

The Witness: One of the four must have writ it in there.

Mr. Cottis: Either you or Havins or Blackard or Starns?

The Witness: One of us wrote in it.

Mr. Cottis: Now you and Blackard and Havins all went back over to McCutcheon's office when he came down, is that right?

The Witness: Yes.

Mr. Cottis: So, did all the first copies that has been executed get returned to McCutcheon's office at that time?

The Witness: All the copies?

(Testimony of Vern Humphries.)

Mr. Cottis: Yes, of Plaintiff's Exhibit 1 that you had signed between six and seven?

The Witness: I couldn't swear what became of them, I don't remember, it was something that I never give a thought.

Mr. Cottis: Now, when this interlined Exhibit No. 2 was retyped by Mr. McCutcheon and was signed by all of you, who had original copies at that time?

The Witness: The original then—Blackard, Kenneth Havins and myself that I am positive of.

Mr. Cottis: And, possibly, there were more signed copies? [75]

The Witness: There may have been one more, I wouldn't say.

Mr. Cottis: But you are absolutely certain in your mind that that was retyped by Mr. McCutcheon?

The Witness: I am positive.

Mr. Cottis: And re-signed?

The Witness: And re-signed.

Mr. Cottis: Then, Your Honor, I object to this copy on the grounds that there is a later authentic copy and this is not the best evidence.

The Court: Of course it isn't the best evidence, but where is the authentic copy? Demand has been made on counsel to produce his copy and counsel has indicated that he knows nothing of it.

Mr. Cottis: That is correct, Your Honor.

The Court: Do you know where the last—where the one you signed last is?

(Testimony of Vern Humphries.)

The Witness: Mr. Blackard has got one.

The Court: Never mind, what about yours, what became of yours?

The Witness: I believe I had mine in the safe at home or in a little box when the house burned.

The Court: Well, what about the other one, where is Kenneth Havins'?

The Witness: He is out in the States. Mr. Blackard—— [76]

The Court: Mr. McCutcheon, have you searched your file?

Mr. McCutcheon: Yes, Your Honor, I certainly have and we don't have the final agreement.

The Court: At this time the exhibit will be admitted upon the ground that the original is missing and I shall also permit counsel for plaintiff to put in evidence the typed copy that is attached to the verified complaint by the defendant Joe Blackard in another action to show that Blackard himself at one time put forth the re-typed agreement, if there was a re-typed agreement, as the agreement upon which he relied. But that can be done later.

The Court will stand in recess for ten minutes until 11:50.

(Short recess.)

The Court: Without objection the record will show all members of the jury present, and the exhibit admitted may be read in whole or in part to the jury.

(Testimony of Vern Humphries.)

Mr. McCutcheon: Will counsel stipulate that it may be read later?

The Court: Upon stipulation of counsel it may be read later.

Mr. McCutcheon: Will counsel at this time stipulate to the admission of the copy of the agreement as attached to Mr. Blackards amended complaint?

Mr. Cottis: For what purpose?

Mr. McCutcheon: Will you stipulate as to its admission in evidence? [77]

Mr. Cottis: No.

Q. (By Mr. McCutcheon): Do you have the exhibits there? What is that piece of paper now before you?

A. That is a suit against Larry Starns—oh, Joe Blackard—and Marvin Campbell and Vernon Humphries, myself, defendants.

Q. What is the name of the paper? What is the title of it?

A. "In The District Court for the Territory of Alaska, Third Division. Joes Blackard, plaintiff, versus Marvin Campbell and Vernon Humphries, defendants."

Q. What is the title of the paper?

A. "Amended Complaint."

Q. Now, turn to—How many pieces of paper are there entitled "Amended Complaint?"

A. There would be four.

Q. Whose name appears at the bottom of page 3?

A. Ralph Cottis—Joe Blackard.

(Testimony of Vern Humphries.)

Q. Read page 4.

A. "United States of America,
"Territory of Alaska—ss.

"Joe Blackard, being first duly sworn, upon his oath, deposes and says: I am the plaintiff in the foregoing Amended Complaint; know the contents thereof, and the matters and things therein set forth are true, as I verily believe.

"/s/ JOE BLACKARD

"Subscribed and sworn to before me this 6th day of January, 1949.

[Seal] "/s/ ESTHER THOMPSON,
"Notary Public for Alaska.

"My commission expires: 9-10-52." [78]

Q. Now, will you look at the last page of that complaint and tell me what it is?

A. Yes, it is the final agreement between Joe Blackard, Larry Starns and ourselves.

Q. It is a copy of the final agreement, did you say? A. Yes, sir.

Mr. McCutcheon: We offer it in evidence.

The Court: Is there objection?

Mr. Cottis: Yes, Your Honor. May I inquire from the witness?

The Court: Yes.

Mr. Cottis: Mr. Humphries, what is the cause number of that action?

The Witness: Number A-5001.

(Testimony of Vern Humphries.)

Mr. Cottis: And do you see the stamp on it in purple by the Clerk's office?

The Witness: Yes.

Mr. Cottis: What is the date that appears on that stamp?

The Witness: January 11, 1949.

Mr. Cottis: Now, Mr. Humphries, I show you what purports to be an amended complaint in Cause No. A-5979, the matter which is now on trial before this Court, and ask you the date that appears on the Clerk's stamp here?

The Witness: May 7, 1948.

The Court: You had better confine yourself to the document [79] offered in evidence. If counsel has any objection he had better state it and state the grounds for it.

Mr. Cottis: I object to it. It hasn't been authenticated except being attached to a complaint. I have another complaint in this action with the same document attached to it, which complaint is verified by Mr. Humphries.

The Court: That is a matter of cross-examination and of argument to the jury. The objection is overruled and the complaint offered is admitted in evidence together with the exhibit attached thereto which purports to be a copy of an agreement. Complaint being verified by one of the defendants in this action, Mr. Blackard.

Mr. Cottis: Exception.

The Court: And the complaint or so much of it that refers to the agreement and the agreement

(Testimony of Vern Humphries.)

itself may be read to the jury or a copy of the agreement.

Mr. Cottis: I except, of course, Your Honor.

The Court: In this case, as in every case, exceptions are to be noted as of course to all adverse rulings of the Court, but that does not preclude counsel from taking oral exceptions at any time.

Does counsel wish to read this paper to the jury or any part of it?

Mr. McCutcheon: Yes, Your Honor, as soon as the Clerk gets through marking it. [80]

Q. Mr. Humphries, is page 4 of Plaintiff's Exhibit 3 the final draft of the agreement between you and Mr. Starns and Mr. Blackard?

A. Yes, it is.

Mr. McCutcheon:

“EXHIBIT A.

“Agreement

“This agreement, made and executed in duplicate at Anchorage, Alaska, this 4th day of February, 1948, by and between Joe Blackard of Anchorage, Alaska, hereinafter referred to as ‘Blackard,’ and Vernon Humphries and Kenneth Havins known as the Alaska Food Service, hereinafter referred to as ‘Humphries.’

“Witnesseth:

“That in consideration of the mutual promises hereinafter set forth, the parties hereto have agreed, and by these presents to agree as follows:

“Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle

(Testimony of Vern Humphries.)

Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska.

“Blackard agrees to furnish the space, light, heat and water necessary for such operation and to provide the utensils and equipment now on the premises. Humphries represents that he has examined the foregoing and is satisfied therewith.

“Humphries shall operate the foregoing restaurant as an independent contractor and will indemnify Blackard from any [81] liability for debts and obligations incurred by Humphries. To implement this agreement, Humphries shall provide bond in the sum of \$3,000.00 for the purpose of protecting Blackard from any claims made against Blackard, and arising out of acts or omissions to act on the part of Humphries.

“Humphries shall pay to Blackard on or before the 10th day of each month a sum equal to 6% of the gross receipts derived from all operations conducted by Humphries upon the premises or the sum of \$200.00, whichever is the greater.

“Humphries shall keep accurate books of account, showing all receipts from said operations of whatsoever nature including airlines business; Humphries agrees to clear all sales through cash register tapes. All books and tapes shall be open to inspection by Blackard, at reasonable times.

“Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage, Humphries agrees to endeavor to obtain the highest possible grading thereunder.

(Testimony of Vern Humphries.)

“The parties understand that the present restaurant equipment is to be moved to a new location approximately 18’ South of its present site. Humphries agrees to bear all expense of moving said equipment and all expenses incurred in furnishing and maintaining additional equipment and utensils as demand may from time to time require. At the termination of this agreement Humphries agrees to surrender the premises peacefully [82] and forthwith and an equipment inventory of equal or better quality than present inventory and allowed to move or sell additional equipment when agreement terminated.

“In event Humphries defaults in the terms of this agreement Blackard may terminate this one year agreement upon 24 hours notice. Humphries may terminate this agreement upon 30 days notice. Upon termination Blackard agrees to reimburse Humphries for the cost of consumable supplies.

“Neither party may assign his interest hereunder without the written consent of other party.

“Humphries shall furnish all labor and supplies necessary to provide service adequate for the demand encountered.

“Witness the hands and seals of the parties date first written.

“/s/ JOE BLACKARD

“/s/ VERNON HUMPHRIES

“/s/ KENNETH HAVINS

“Witness:

“/s/ S. McCUTCHEON.”

(Testimony of Vern Humphries.)

Mr. McCutcheon: This is Plaintiff's Exhibit 3.

The Court: I suggest that that part of the complaint which has reference to the exhibit should be first read.

Mr. McCutcheon: Paragraph I of page one of Plaintiff's Exhibit 3 is as follows:

"That on or about 4 February, 1948, he entered into an agreement with Vern Humphries and one Kenneth Havins under the [83] terms of——"

The Court: Who is the plaintiff?

Mr. McCutcheon: "In the District Court for the Territory of Alaska, Third Division, Joe Blackard, plaintiff versus Marvin Campbell and Vern Humphries, defendants, No. A-5001."

"——which the said Humphries and Havins, as a partnership, were obligated to pay to plaintiff a minimum sum of Two Hundred Dollars (\$200.00) per month thereafter in consideration of the plaintiff's granting them a concession to operate the kitchen in the premises known as 'The Panhandle Cafe,' at 314 Fourth Avenue, Anchorage, Alaska, a copy of said agreement is hereto attached, marked 'Exhibit A,' and made a part hereof."

"Amended Complaint

"Comes Now the above-named plaintiff by his attorneys, Hellenthal, Hellenthal and Cottis, and for his causes of action herein alleges:

"II.

"Upon information and belief, that the defendant

(Testimony of Vern Humphries.)

Marvin Campbell subsequently succeeded to the rights and liabilities of the said Kenneth Havins and has at all times herein mentioned operated in partnership with the said Vern Humphries in connection with the foregoing concession.

“III.

“That the said concession agreement was terminated for cause and pursuant to its terms by the plaintiff herein on 15 [84] April, 1948; that prior to such termination there had accrued to the plaintiff from the defendants the sum of \$400.00, no part of which has been paid, although demand therefor has been made by the plaintiff.

“For His Second Cause Of Action Herein, The Plaintiff Re-alleges Paragraphs I, II And III Above And Further Alleges:

“IV.

“That the defendants herein wrongfully and unlawfully refused to quit the premises after termination of the aforesaid agreement by the plaintiff; that by reason thereof, plaintiff's business was injured to the extent of \$12,000.00.

“For His Third Cause Of Action Herein, The Plaintiff Re-alleges Paragraphs I, II And III Above And Further Alleges:

“V.

“That prior to the termination of said agreement,

(Testimony of Vern Humphries.)

the defendants neglected and refused to comply with the terms thereof in that they failed to provide the bond required therein, and in that they failed to operate a sanitary and lawful restaurant in accordance therewith; and in that they failed to pay the debts incurred by them in such operation and to bear the expense of moving equipment and of furnishing additional equipment.

“VI.

“That by reason of the foregoing breaches of contract by the defendants, the plaintiff has been damaged in an additional sum of \$10,000.00. [85]

“For His Fourth Cause Of Action Herein, The Plaintiff Re-alleges Paragraphs I, II And III Above And Further Alleges:

“VII.

“That heretofore and prior to 3 March, 1948, at the special instance and request of the defendants, one Harold H. Bliss, doing business as The Bliss Construction Company, performed certain labor and furnished certain materials for the said defendants in connection with the transaction contemplated by said Exhibit A; that the reasonable and agreed worth of such labor and materials is Three Thousand and Five Dollars and 89/100 (\$3,005.89).

“VIII.

“That on 4 May, 1948, the said Harold H. Bliss for valuable consideration assigned his claim against

(Testimony of Vern Humphries.)

the defendants to the plaintiff herein; that the plaintiff is now the holder of said claim.

“IX.

“That no part of said sum has been paid, although demand therefor has been made; that by reason thereof there is now due and owing to the plaintiff from the defendants the sum of Three Thousand and Five Dollars and 89/100 (\$3,005.89) with interest from 3 March, 1948.

“For His Fifth Cause Of Action Herein, The Plaintiff Re-alleges Paragraphs I, II And III Above And Further Alleges: [86]

“X.

“That on or about 5 February, 1948, at the request of the defendants and in connection with the transaction contemplated in Exhibit “A,” plaintiff lent to the said defendants the sum of Four Hundred and Fifty Dollars (\$450.00); that the said loan was evidenced in writing; that under the terms thereof the full amount was to be repaid to the plaintiff on 15 February, 1948; that no part thereof has been paid, although due demand therefor has been made.

“XI.

“That by reason thereof, there is now due and owing to the plaintiff by the defendants the sum of Four Hundred Fifty Dollars (\$450.00), with interest from 5 February, 1948.

(Testimony of Vern Humphries.)

“XII.

“That Plaintiff has been compelled to employ attorneys to enforce his causes of actions against the defendants herein.

“Wherefore, plaintiff demands judgment against the defendants for:

“(a) \$3,855.89 with interest upon \$450.00 from 5 February, 1948; with interest upon \$3,005.89 from 3 March, 1948; with interest upon \$200.00 from 10 March, 1948, with interest upon \$200.00 from 10 April, 1948;

“(b) \$12,000.00 for injury to plaintiff’s business;

“(c) \$10,000.00 for damages for breaches of contract;

“(d) His costs and disbursements herein;

“(e) His reasonable attorneys’ fees herein;

“(f) Such other and further relief as the court may deem just and equitable.

“/s/ Ralph H. Cottis

“ Ralph H. Cottis,

“Of Hellenthal, Hellenthal & Cottis

“Attorneys for the Plaintiff.”

“Endorsed

“Filed in the District Court

“Territory of Alaska, Third Division

“January 11, 1949

“M. E. S. Brunelle, Clerk,

“By Virginia Olson, Deputy.”

The Court: Counsel may suspend. The trial will

(Testimony of Vern Humphries.)

be continued until two o'clock this afternoon and in the meantime you will observe your duty and that is not to talk about the case among yourselves or with others and not listen to any conversations or expression about it.

Court stands in recess until two o'clock this afternoon.

(Whereupon, at 12:05 p.m., Wednesday, June 22, 1949, the trial was recessed until 2:00 p.m. the same day.) [88]

Afternoon Session

The Court: Roll of the jury may be called.

(Names were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Counsel may proceed with the reading of the exhibit.

Mr. McCutcheon: "Exhibit A.

"Agreement

"This agreement, made and executed in duplicate at Anchorage, Alaska, this 4th day of February, 1948, by and between Joe Blackard of Anchorage, Alaska, hereinafter referred to as 'Blackard,' and Vernon Humphries and Kenneth Havins known as the Alaska Food Service, hereinafter referred to as 'Humphries.'

"Witnesseth:

"That in consideration of the mutual promises

(Testimony of Vern Humphries.)

hereinafter set forth, the parties hereto have agreed, and by these presents to agree as follows:

“Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska.

“Blackard agrees to furnish the space, light, heat and water necessary for such operation and to provide the utensils and equipment now on the premises. Humphries represents that he has examined the foregoing and is satisfied therewith.

“Humphries shall operate the foregoing restaurant as an [89] independent contractor and will indemnify Blackard from any Liability for debts and obligations incurred by Humphries. To implement this agreement, Humphries shall provide bond in the sum of \$3,000.00 for the purpose of protecting Blackard from any claims made against Blackard, and arising out of acts or omissions to act on the part of Humphries.

“Humphries shall pay to Blackard on or before the 10th day of each month a sum equal to 6% of the gross receipts derived from all operations conducted by Humphries upon the premises or the sum of \$200.00, whichever is the greater.

“Humphries shall keep accurate books of account, showing all receipts from said operations of whatsoever nature including airlines business; Humphries agrees to clear all sales through cash register tapes. All books and tapes shall be open to inspection by Blackard, at reasonable times.

(Testimony of Vern Humphries.)

“Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage, Humphries agrees to endeavor to obtain the highest possible grading thereunder.

“The parties understand that the present restaurant equipment is to be moved to a new location approximately 18' South of its present site. Humphries agrees to bear all expense of moving said equipment and all expenses incurred in furnishing and maintaining additional equipment and utensils as demand may from time to time require. At the termination of this agreement Humphries [90] agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory and allowed to move or sell additional equipment when agreement terminated.

“In event Humphries defaults in the terms of this agreement Blackard may terminate this one year agreement upon 24 hours notice. Humphries may terminate this agreement upon 30 days notice. Upon termination Blackard agrees to reimburse Humphries for the cost of consumable supplies.

“Neither party may assign his interest hereunder without the written consent of other party.

“Humphries shall furnish all labor and supplies necessary to provide service adequate for the demand encountered.

(Testimony of Vern Humphries.)

“Witness the hands and seals of the parties date first written.

“/s/ JOE BLACKARD

“/s/ VERNON HUMPHRIES

“/s/ KENNETH HAVINS”

and it is witnessed by myself.

Mr. Cottis: May it please the Court. The Court this morning directed me to search my files to see whether I had an original copy of Plaintiff's Exhibit No. 2 and if I did to produce it. I wish to inform the Court that I have searched my files and can find no such original copy nor any such copy except copies attached to various pleadings and I have no recollection [91] of having seen the original.

The Court: The Exhibit referred to would be now No. 3, or the copy of purported agreement attached to Plaintiff's Exhibit No. 3, which embraces the Amended Complaint and the Agreement having incorporated therein interlineations.

Mr. Cottis: It is my understanding, Your Honor, that Exhibits 2 and 3 are identical?

The Court: Yes, I assume so.

Mr. Cottis: Yes.

The Court: But at any rate counsel has not been able to find any original of any—any signed original of those papers?

Mr. Cottis: No, Your Honor. As nearly as my search disclosed, our office copied that agreement

(Testimony of Vern Humphries.)

from the copy attached in this action here in 4979, which is the action now before the Court. There is a copy of it attached to these plaintiffs' Amended Complaint in this action, and this action was filed some eight months prior to our 5001.

The Court: Is that the action now on trial?

Mr. Cottis: Now on trial.

The Court: That is a matter for argument.

Mr. Cottis: Yes, Your Honor.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): Was there a restaurant in the premises known as the Panhandle prior to the time of this agreement? [92]

A. Yes.

Q. And did you purchase that business?

A. Yes, I did.

Q. And from whom did you purchase it?

A. From Clyde Graves.

Q. How much did you pay, if anything?

A. I paid \$2,500.00.

Q. I will hand you a piece of paper and ask you to tell what it is?

A. It is a bill of sale of the equipment in the restaurant of the Panhandle.

Q. Is there a date on the bill of sale?

A. Yes, there is.

Q. What is the date? A. The date is——

Q. Is there an acknowledgement on it?

A. The 5th day of February, 1948.

Q. Is the bill of sale signed? A. Yes, it is.

(Testimony of Vern Humphries.)

Q. By whom is it signed?

A. It is signed by C. L. Graves.

Q. And was C. L. Graves the owner of the restaurant? A. Yes, he was.

Q. Prior to your purchase? A. Yes. [93]

Q. And is that the bill of sale conveying the restaurant to you? A. Yes, it is.

Q. And does that set out the items conveyed to you? A. Yes.

Q. And on what page is that?

A. That is on the second page.

Mr. McCutcheon: I will offer it in evidence.

The Court: It may be shown to counsel for defendant.

Mr. Cottis: May I inquire from the witness, Your Honor? Did you see Mr. Graves sign this, Mr. Humphries?

The Witness: Did I see him? Yes, I did.

Mr. Cottis: Where was it that he signed it?

The Witness: In Stan McCutcheon's office.

Mr. Cottis: And that was on the date that appears in the document which was February 5, 1948?

The Witness: Yes, sir.

Mr. Cottis: Your Honor, I have no objection to the offering on grounds of authenticity. I object to it on the grounds of relevancy, the document doesn't show where these items were located. There is nothing connected with the matters at issue in this lawsuit.

The Court: Objection will be overruled at this time and it may be admitted marked Plaintiff's Exhibit 4. It may be read to the jury. [94]

(Testimony of Vern Humphries.)

Mr. McCutcheon: Will counsel stipulate that it may be read at a later time?

Mr. Cottis: Certainly.

The Court: Is it to be read now?

Mr. McCutcheon: It is to be read later, Your Honor.

The Court: Is that agreeable to counsel?

Mr. Cottis: That is agreeable, Your Honor.

Q. (By Mr. McCutcheon): Will you turn to page 2 of the bill of sale, Plaintiff's Exhibit 4, please?

A. Yes.

Q. Does that page contain a list of items that you purchased when you purchased the restaurant business?

A. Yes.

Q. Will you read off the items on that page that you purchased when you purchased the restaurant business—slowly, please?

A. One large ice box; one meat cutter; one meat grinder; 16 counter stools; one counter; one menu board; miscellaneous dishes; miscellaneous cooking utensils.

Q. Does that constitute all of the items that you purchased by that bill of sale?

A. Yes.

Q. Now, are there other items appearing on that page of Exhibit 4?

A. Yes. [95]

Q. And will you read off those items, please?

A. One electric meat slicer; one electric steak cuber; one electric frigidaire.

Q. Yes.

A. One large electric french fryer; one electric meat saw. That is all.

(Testimony of Vern Humphries.)

Q. Now, were those items on there at the time the bill of sale was executed?

A. No, sir, they were not.

A. I went to the bank for a \$2,500.00 loan later on for purchase of equipment.

Q. Will you show the instrument to the Court there, please. Now, go ahead with your testimony.

The Court: I suppose it would be more in order to show it to the jury but that could be done later.

Q. (By Mr. McCutcheon): Now, do I understand you, Mr. Humphries, that there are five items appearing on page 2 of Exhibit 4 that were not there at the time the bill of sale was executed?

A. Right.

Q. Now, go ahead with your explanation as to how those five items got on page 2?

A. I went to the Bank of Alaska for a \$2,500.00 loan and I borrowed up on equipment—I purchased this equipment here in [96] addition to the other I had bought in this other bill of sale and I asked for the loan, which we typed them on here and used it for a bill of sale of all the equipment into the Bank of Alaska.

Q. Now, the first item that appears there is One Electric Meat Slicer, is that correct?

A. Yes, sir.

Q. Where did you purchase that meat slicer?

A. Seattle.

Q. How much did you pay for it?

A. I paid \$575.00.

(Testimony of Vern Humphries.)

Q. Now the next item is one electric steak cuber, is that correct? A. That is correct.

Q. Where did you buy the steak cuber?

A. Seattle.

Q. How much did you pay for it?

A. \$318.00.

Q. And the next is one electric frigidaire?

A. Yes.

Q. Where did you purchase the frigidaire?

A. War Supply Store on Fifth Avenue.

Q. How much did you pay for it?

A. \$300.

Q. And the next is one large electric french fryer, is that correct? [97] A. Yes.

Q. Where did you purchase the french fryer?

A. From the Alaska Railroad.

Q. How much did you pay for it?

A. \$165.00.

Q. And the fifth item is one electric meat saw, is that correct? A. Yes.

Q. How much did you pay for that?

A. I paid \$585.00.

Q. Where did you purchase it?

A. From Northern Supply.

Q. Now, did you purchase any other items in connection with your business other than your consumable supplies inventory? A. Yes, I did.

Q. Can you list those items?

A. Yes, I purchased one electric unit.

Q. What do you mean by "One Electric Unit"?

(Testimony of Vern Humphries.)

A. Well, it is an electric unit for an icebox.

Q. Where did you purchase it?

A. I purchased that from one of the electric shops here in town, I forgot just the name of it just right off hand.

Q. Do you mean by that a compressor unit?

A. Yes.

Q. How much did you pay for it, do you recall?

A. I paid \$600 for it.

Q. Now, did you purchase anything else?

A. Yes, dishes and silverware.

Q. Where did you purchase your dishes and silverware?

A. From Bailey Kobey here in town and Kennedy Hardware and Green and Winkler in Seattle.

Q. How much did you pay for the dishes and silverware? A. Near \$500.

Q. Can you remember the exact amount?

A. Yes, it was \$500.

Mr. Cottis: Your Honor, I object to this line of questioning on the grounds that it is irrelevant to any matters stated in the complaint unless the purpose of it is to show the capital investment of Mr. Humphries in this business.

The Court: Well, I presume it will be connected up by—it is merely preliminary, as I understand, as I understand, at this moment it isn't relevant, but I assume that counsel isn't just putting it in trivially.

Mr. Cottis: Very well.

(Testimony of Vern Humphries.)

The Court: Objection at this time will be overruled and, of course, if it isn't connected up the Court will entertain a motion to strike and have the jury disregard it.

Q. (By Mr. McCutcheon): How did you wash your dishes at the restaurant?

A. By a dish washing machine. [99]

Q. Where did you get the dishwashing machine?

A. From Northern Supply Store.

Q. How much did you pay for the dishwasher?

A. I paid the sale price of it was \$255.00.

Q. Now, do you still owe for part of it?

A. Yes, I do.

Q. How much did you pay for it?

A. I paid, I believe, \$150.00.

Q. Now, did you have a sink? A. Yes.

Q. Was that a part of the original sale?

A. No.

Q. Where did you purchase the sink?

A. The sink was bought here in town.

Q. Do you remember where?

A. Yes, it was bought from Alaska Electric.

Q. Do you remember how much you paid for it?

A. Yes, \$143.00.

Q. Now, was there a stove in the restaurant when you purchased the restaurant?

A. Yes, it was.

Q. Was it in a good state of repair?

A. No, it wasn't.

Q. Did you repair it?

(Testimony of Vern Humphries.)

A. Yes, it had almost to be a new stove built out of it. [100]

Q. Who repaired it for you?

A. Lube Fisher for one and then General Electric or some electric shop here. I know the name if I can remember it.

Q. How much did you pay for the initial repair?

A. \$125.00.

Q. You made subsequent repairs to it, did you?

A. Yes.

Q. The initial repair was \$125.00 is that correct?

A. That is right.

Q. Now, did you make repairs to the chimney?

A. I built a new chimney.

Q. How much did you pay for that?

A. \$500.

Q. Who built the chimney?

A. Lube Fisher.

Q. Did you have any cupboards built?

A. Yes.

Q. Who built the cupboards?

A. Carpenter by the name of Sergeant.

Q. How much did you pay for that?

A. \$125.00.

Q. Did you have any mirrors in the restaurant?

A. Yes.

Q. Did they come with the original purchase?

A. No. [101]

Q. Did you purchase the mirrors?

A. Yes, I did.

(Testimony of Vern Humphries.)

Q. Where did you purchase the mirrors?

A. Up here at the N. C. Company.

Q. And how much did you pay for the mirrors?

A. The mirrors cost me \$70.00.

Q. Did you pay out anything in wages in moving the counter from the front of the restaurant to the rear or in repairs or alterations?

A. Yes, I paid some.

Q. And to whom did you pay that, if you recall?

A. Well, I paid up on the decoration of the place.

Q. How much did you pay?

A. I paid out around \$330 for labor upon the painting and paper hanging.

Q. How much did you pay out in painters wages?

A. I paid out \$208.37.

Q. Did you pay helpers wages?

A. Yes.

Q. How much did you pay in helpers wages?

A. Helpers wages was \$100.

Q. How did you advertise your business?

A. I advertised by radio and by the newspaper and by Neon sign in the front window.

Q. Did you purchase the Neon sign? [102]

A. Yes, I did.

Q. From where did you purchase it?

A. From Alaska Neon Company.

Q. And how much did you pay for it?

A. \$95.00.

Q. Now, Kenneth Havins was your partner at

(Testimony of Vern Humphries.)

the time you purchased this restaurant, is that correct? A. That is correct.

Q. And did he remain your partner?

A. No, he didn't.

Q. Who, if anyone bought him out?

A. Richard Jones bought him out.

Q. And did Richard Jones then remain your partner? A. No.

Q. Who bought Richard Jones out?

A. I did.

Q. What did you pay for his interest in the restaurant business?

A. I paid him \$750, somewhere along there, \$750 or \$760 somewhere.

Q. And did he owe you some money?

A. Richard Jones? Yes, he did.

Q. He owed you for half of the original purchase, is that correct? A. That is correct.

Q. And was that obligation cancelled?

A. Yes, it were.

Q. I hand you a piece of paper and ask you to tell what it is, if you can?

A. Yes, that is a release from Kenneth Havins and Richard Jones.

Q. For what?

A. For their partnership into the Panhandle.

Q. What is the date?

A. The date is 26th of March, 1948.

Q. And is it signed? A. Yes, it is.

Q. By who?

(Testimony of Vern Humphries.)

A. Richard Jones and Kenneth Havins and witnessed by Stanley McCutcheon.

Mr. McCutcheon: Offer it in evidence.

Mr. Cottis: May I inquire from the witness, Your Honor?

Mr. Humphries, did you see Mr. Jones and Mr. Havins sign that?

The Witness: Yes, I did.

Mr. Cottis: Where was it signed?

The Witness: We signed in Stanley McCutcheon's office.

Mr. Cottis: And he was present at the same time, was he?

The Witness: Yes, sir. He signed it.

Mr. Cottis: I have no objection to the authenticity, Your [104] Honor, I object to it on the grounds of irrelevancy, Your Honor.

The Court: Objection is overruled and it may be admitted and marked Plaintiff's Exhibit 5 and may be read to the jury.

Mr. McCutcheon: Does counsel stipulate that the reading may be waived at this time?

Mr. Cottis: Yes.

Q. (By Mr. McCutcheon): Now, did you purchase an inventory of foodstuff at the time you opened up your business?

A. No, you mean from Clyde Graves? No, I didn't.

Q. What happened to the inventory—his inventory, did he have an inventory?

(Testimony of Vern Humphries.)

A. Yes, he did.

Q. What did he do with it?

A. He sold it across the street to the Log Cabin or Log something.

Q. Did you purchase an inventory?

A. Yes, I did.

Q. How much of an inventory did you purchase?

A. Well, I had about \$1,500.00 inventory and I purchased in the neighborhood of \$2,000 more.

Q. You say you had a \$1,500.00 inventory, where did that inventory come from?

A. From the Alaskan Railroad.

Q. Were you in business with the Alaskan Railroad? [105]

A. I had a lease concession for food with the Alaskan Railroad.

Q. And when your contract expired is that how you came by this inventory? A. Yes, it is.

Q. And did you purchase an inventory in addition to the \$1,500? A. Yes, I did.

Q. And from whom did you purchase that inventory?

A. From Grocery Supply, Ship Creek Market and Merchandisers, and then there was a war surplus fellow that I bought some war surplus goods from, Frank someone, I can't recall it right now.

Q. Was it Frank—what was his name?

A. Frank Irish. Also I bought about a thousand dollars worth of airborne meat from Columbia Air Cargo.

(Testimony of Vern Humphries.)

Q. Now, how long had Blackard and Starns had the Panhandle premises when you entered into this agreement?

A. Well, right when they entered in I don't know, I understood they had bought it and I don't know just what day they bought it on.

Q. Did you find out later on?

A. Yes, I did.

Q. Do you know now how long they had the Panhandle? A. Yes.

Mr. Cottis: I object, Your Honor, on the grounds that it is obviously a conclusion of the witness. [106]

The Court: I don't see the relevancy of it, what difference would it make how long they had it at the time, they were in possession of it.

Mr. McCutcheon: Very well, I was just going on Mr. Cottis' remarks in his opening statement with reference to the same point and I thought I might clear up the matter. I will withdraw the question.

Q. Now, was the place closed when you entered into this agreement?

A. They were getting ready to close. They closed it two or three days after the agreement was signed.

Q. Why did they close it up?

A. For the remodeling.

Q. And was that the time when your counter was moved to the rear of the restaurant?

A. Yes.

Q. And was it later on moved to the rear of the restaurant? A. Yes.

(Testimony of Vern Humphries.)

Mr. Cottis: I object to the leading questions.

The Court: Counsel should not ask leading questions; objection is sustained.

Mr. McCutcheon: I did not think they were leading on material points, but if counsel wishes to hold me down, very well.

Q. Was the rest of the counter moved? [107]

A. Yes.

Q. Where was it moved to?

A. It was first moved 18 feet from the front end of the Panhandle.

Q. Where to?

A. It was moved straight back 18 feet and then later on it was moved back four and one-half feet more.

Q. And where did it then rest?

A. It rested in the back end of the Panhandle then.

Q. How far back?

A. 24 and one-half feet back, clear in back of the liquor store.

Q. How far back with reference to the rear of the Panhandle premises?

A. It was as far back as you dare to go on account of a side door. I had to lose two feet off my counter by going back that far.

Q. Was that according to the agreement?

A. No, sir.

Mr. Cottis: I object, Your Honor, the agreement speaks for itself.

(Testimony of Vern Humphries.)

The Court: Overruled.

Q. (By Mr. McCutcheon): Was that according to the agreement? A. No. [108]

Q. Did you have other agreements with Blackard and Starns after you entered into the written agreement, Exhibit 4?

A. Yes, there was one occurred over moving the bar.

Q. Was that an oral agreement or verbal agreement? A. That was verbal.

Q. Did you have an agreement with reference to the view from the street? A. Yes, sir.

Q. What was that agreement?

A. That the restaurant could be seen from the way the bar was to be built.

Mr. Cottis: Your Honor, just a moment, Mr. Humphries, I would like to know when the agreement was made and with whom? Mr. Humphries this morning referred to Exhibits 2 and 3 as the final agreements.

The Court: The time and place may be fixed.

Q. (By Mr. McCutcheon): Time and place, Mr. Humphries?

The Court: As nearly as you can remember?

Q. (By Mr. McCutcheon): Will you state the time and the place of the oral agreement that you are now testifying to?

A. Yes, it was when the liquor store was being put in in the front end of the Panhandle.

Q. Now, what was the agreement you had with

(Testimony of Vern Humphries.)

them with reference [109] to the view from the street.

Mr. Cottis: I don't believe that the time and place has been fixed, Your Honor.

The Court: What time was it and where was it? What time was it as nearly as you know and where was the conversation had?

The Witness: The conversation was had in the Panhandle and it was about two weeks after we had signed this agreement, I would say, somewhere in the near of February. I couldn't tell you the day, it was in the 20's and about nine o'clock in the morning.

Mr Cottis: And, Your Honor, I continue my objections unless he relates who was present.

Mr. McCutcheon: I will get to that if I get an opportunity.

Q. Now, who was present?

A. Larry Starns and Joe Blackard, Marvin Campbell and myself.

Q. Now, what was the agreement?

A. The Agreement were that Larry didn't have enough room for his liquor store and he said he was moving me four and one half feet further toward the back end. I objected it would run into more plumbing and run into a lot of meals and that I wouldn't get as much counter space as I was supposed to have.

Q. How much counter space was you supposed to have?

(Testimony of Vern Humphries.)

A. I was supposed to have 32 feet and an "L" eight feet [110] long.

Q. When did you enter into that agreement?

A. That was in the latter part of the 20's of February, 1948.

Q. Who was present when you made that agreement or is it the same one?

A. It is the same one.

Q. How much counter space were you to have?

A. I was to have all told 40 feet.

Q. And was it an "L" shape, did you say?

A. Yes.

Q. How much was the main counter to be?

A. The main counter was 32 feet long.

Q. How much was the "L" to be?

A. 8 feet.

Q. How many stools were you going to put on the "L"? A. 4 stools.

Q. How many stools were to be on the main counter? A. 17 stools.

Q. Go ahead with your testimony with reference to the agreement?

A. So by Larry Starns taking more than 18 feet he cut off my counter and I lost ten feet. I had to move all the equipment further back, change all the plumbing and I told them that "No Dice" that the work would stop and forbid them from moving the counter further back. [111]

Q. What did he then do?

A. I came over and saw Stan McCutcheon, my attorney.

(Testimony of Vern Humphries.)

Q. And then what happened?

A. He advised me to go back over and see if we couldn't take and reach agreement, which we did.

Q. Now, the original agreement called for posting a bond, did it not? A. Yes, it did.

Q. And did it call for you paying the expenses of moving? A. Yes, it did.

Q. Now, continue with your testimony on the present agreement, the oral agreement?

A. Well, I agreed that I would take and give up four and one-half more feet and lose my part of the counter providing that the bond was waived and Larry said he would take care of that and that he would stand the expense of moving further back, that he had to have the full 24 and one-half feet for the liquor store. So they had the carpenter to start again and the work proceeded. There was no more said about nothing.

Q. Now, did you say you had an agreement with reference to the view from the street?

A. Yes, I did.

Q. And was that agreement had at the same time?

A. Yes, but I lost it. They was supposed to take and run a sloping narrow at the back end of the liquor store was supposed [112] to be narrowed, supposed to run in kind of a "V" shape like and they built it out square which had the view from the street of the restaurant.

(Testimony of Vern Humphries.)

Mr. Cottis: Your Honor, I understand that all this is subject to my later motion to strike for reasons that it wasn't connected up in any way with the Complaint.

The Court: It may be so considered.

Mr. McCutcheon: Your Honor, we are on a different subject.

The Court: At any rate if counsel desires it that way it may be considered so.

Mr. Cottis: Yes, Your Honor.

The Court: Counsel can object anytime he feels so disposed.

Mr. Cottis: Very well, Your Honor, I object right now to this line of questioning on the grounds that it is not connected with anything at all in the Complaint, this later agreement—this moving of counters—and so forth, there is no notice of any such charge in the Complaint.

Mr. McCutcheon: I submit, Your Honor, that is completely material and I will await Your Honor's ruling.

The Court: Objection is overruled.

Mr. McCutcheon: Do I understand now, Your Honor, that counsel will have the privilege of moving to strike all of the testimony that has been heretofore given?

The Court: Counsel would have that right anyhow and I have [113] said that he has the right and he has it, but the Court could not deny counsel the right or privilege, as it is called. I think it is a

(Testimony of Vern Humphries.)

right to move to strike at any time if the evidence given is finally not relevant to the main issue. Then counsel has the right to make a motion to strike it and the Court is bound to consider it.

Mr. McCutcheon: Very well, sir, I was under the impression that an objection must first be entertained.

The Court: Well, usually Courts do not look with any great enthusiasms upon motions to strike when no objections are made but, nevertheless, the motion to strike may be made and the disposition of that motion is always within the sound discretion of the Court. I say "sound discretion" not arbitrary discretion. It is within the judicial discretion of the Court.

Mr. McCutcheon: Very well. Read the last answer.

(Answer read.)

The Court: Court will stand in recess for ten minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. McCutcheon: Read the last question.

(Question read.)

Q. Now, was Mr. Starns present at that time?

A. Yes, he were.

Q. And did he enter into the agreement? [114]

A. Yes, he did.

(Testimony of Vern Humphries.)

Q. Did he have anything to say?

A. He had the floor then. He was doing the talking.

Q. And was Mr. Starns around there frequently?
A. Yes, he were.

Q. And did he have anything to say about the remodeling?
A. Yes.

Q. Was it necessary for you to frequently consult him?
A. Yes, it were.

Q. Did you consult him when you entered into the original agreement?
A. Yes.

Q. Was it necessary to get his approval?

A. Yes.

Q. Now, where was the restaurant counter with reference to the liquor store at the wind-up of the thing?

A. It was jammed right up against the liquor store.

Q. Could you see it from the street?

A. No, you couldn't.

Q. Was this damaging your business?

A. Yes, it were.

Mr. Cottis: Object to the leading question, Your Honor.

The Court: Just a moment, does counsel object?

Mr. Cottis: Yes, Your Honor.

The Court: On what—— [115]

Mr. Cottis: On the grounds it is a whole series of leading questions.

The Court: Yes, it is, the questions are unduly

(Testimony of Vern Humphries.)

leading. It is true that occasionally we get over some preliminary matter speedily where leading questions are permitted but we have here a whole series of leading questions and counsel should avoid them.

Mr. McCutcheon: I would like to go back over the last few, Your Honor. I asked him where the restaurant counter was located with reference to the liquor store.

The Court: That is not leading by any means.

Mr. McCutcheon: I asked him if the restaurant could be seen from the street.

The Court: You may put that in another fashion. State whether or not the restaurant could be seen from the street? The general tenor of counsel's questions recently has been unduly leading.

Mr. McCutcheon: I apologize for that, Your Honor, I was leading the witness on matters I didn't consider extremely material and in order to hasten the case along.

The Court: Quite right, I appreciate that that is frequently done but there is a limit to it.

Mr. McCutcheon: Yes. But the last four or five questions I don't believe were leading when counsel objected, sir.

Mr. Cottis: Your Honor, may I be heard?

The Court: Yes.

Mr. Cottis: In specific I object to the question which was substantially this: "Was it necessary to get Mr. Starns' consent to these agreements?" and I ask that the answer be stricken.

(Testimony of Vern Humphries.)

The Court: No, the question was asked and answered without any objection, counselor. The motion will be denied. It is true that it is a leading question. Counsel has the right to cross-examine upon that and every other subject.

Mr. Cottis: Yes, Your Honor.

The Court: Usually no little harm is done by leading questions except on some extremely vital point where a witness may be led to say things he otherwise would not say. Counsel may proceed and avoid leading questions.

Mr. McCutcheon: Yes, sir.

The Court: So far as possible.

Q. (By Mr. McCutcheon): Now, could the restaurant be seen from the street, Mr. Humphries?

A. No, it couldn't.

Q. Was this damaging to your business.

A. Yes.

Mr. Cottis: Objection, Your Honor, "was this damaging to your business?"

The Court: That is a leading question. [117]

Mr. Cottis: And I object.

The Court: Objection is sustained. "What was the effect on your business not having any view from the street?"

Q. (By Mr. McCutcheon): If any?

A. Yes, it hurt my business considerably because the public could not see that there was a restaurant in there.

Q. And how do you know that?

(Testimony of Vern Humphries.)

A. Because numbers of customers came in and said "Gee, I didn't know there was a restaurant in here."

Q. Now, how many stools did you wind up with?

A. 16.

The Court: Altogether?

The Witness: Altogether.

The Court: How many stools did you have in your original counter?

The Witness: 21 planned.

Q. (By Mr. McCutcheon): What was the value of your consumable inventory at the time you opened up the business?

A. My inventory was brought up to around \$4,000.

Q. How long were you in business?

A. I was in business two months and one-half from the 6th of March until the 21st of May.

Q. Did you maintain that inventory or was it larger or less [118] at the expiration of your business?

A. My inventory remained about the same.

Q. How frequently did you replenish it?

A. About every few days.

Q. From whom did you purchase most of your supplies?

A. From Grocery Supply Company, Piggly and Ship Creek Market.

The Court: You say you were in business between what period—the 6th of March——?

(Testimony of Vern Humphries.)

The Witness: To the 21st of May.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): How did you pay for your inventory when you purchased it?

A. Mostly by check.

Q. Do you have any records of your business?

A. The only records that I have is the checks that hadn't been going out of the bank.

Q. Now, did you keep books of account?

A. Yes.

Q. And do you have those books of account now?

A. No, I don't have.

Q. And what happened to them, if you know?

A. Well, I believe that it was destroyed or something happened to them at the time of the fire in my home while I were about 6,000 miles away.

Q. When did your home burn? [119]

A. My home burned on the first day of October, 1948.

Q. Where was your home—here in Anchorage?

A. Yes, 538 "M" Street.

Q. Now, how long was your agreement with Blackard and Starns to run?

A. For one year.

Q. How much rent were you to pay?

A. I was either to pay \$200 a month or 6%, whichever was the greater.

Q. Now, what was to happen to the inventory of consumable supplies in the event of termination of your agreement?

(Testimony of Vern Humphries.)

A. Blackard was to reimburse me. Blackard was to reimburse me.

Q. And that was part of the written agreement?

A. Yes, it were.

Q. Did Blackard ever consider that he terminated your lease? A. Yes.

Mr. Cottis: Object, Your Honor, Humphries doesn't know what Blackard considered.

Mr. McCutcheon: Well, I will rephrase the question, if counsel wishes.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): Did Blackard ever attempt to terminate your lease, Mr. Humphries?

A. Yes, he did by Deputy Marshal serving the paper.

Q. Referring to Defendant's Exhibit "A," is that the paper you received? A. Yes, it is.

Q. And on what date did you receive that paper?

A. I believe that it was on the 15th day of April.

Q. It is dated April 15, 1948, addressed to:

"Vernon Humphries,

"Kenneth Havins and

"Alaska Food Service,

"Anchorage, Alaska.

"Dear Sirs:

"Please take notice that the agreement executed by us on 4 February, 1948, is hereby terminated, such termination to be effective twenty-four (24) hours from the hour of receipt of this notice by you.

"The defaults upon which this termination is based are:

(Testimony of Vern Humphries.)

“(1) You have failed to provide the bond required by the contract.

“(2) You have failed to pay me the amounts stipulated in the contract for your concession.

“(3) You have failed to comply with the law, in that you illegally had moose meat upon the premises.

“(4) You have failed to pay the expenses incurred by you.

“Sincerely,”

“By /s/ JOE BLACKARD.” [121]

The Court: What is the last one again, I didn't understand it,—4?

Mr. McCutcheon: 4. “You have failed to pay the expenses incurred by you.”

Q. Now, at the time that notice was served on you, Mr. Humphries, did Mr. Blackard offer to purchase your inventory? A. No, he didn't.

Q. What was the value of your inventory at the time the notice was served on you?

A. Around \$4,000.

Q. That is your consumable inventory?

A. Yes.

Q. Now, where were your supplies kept?

A. My supplies was—we had storeroom in the basement.

Q. And what was the value of the inventory in the storeroom in your basement?

A. It was around \$2,000, but I hadn't seen it for about a month before I moved out.

(Testimony of Vern Humphries.)

Q. Why not?

A. Because Blackard had placed a padlock and refused me entrance into the storeroom.

Q. When was that?

A. That was somewhere around about the 14th of April. It was about a day before the notices was served on me.

Q. And what did you say he did? [122]

A. He placed a padlock upon the door of the storeroom and permitted us to enter.

Q. Did he do anything else?

A. Yes, he changed the lock on the front door. He closed the place down at one o'clock, which we were operating 24 hours a day, put the stools on the counter, turned the stoves out and told customers that he had closed me out of business—I was no longer there.

Q. And on what date was this?

A. That was on the 15th day—night of the 15th of April, the same day he served the paper on me.

Q. And what did you do then?

A. I wasn't there at the time he locked the whole place up and I was called out about one o'clock at night from my home and I came down and consulted with the policeman and I asked Joe first to let me in and he yelled through the door I couldn't get in and I went to the police and they said the best thing I could do was consult an attorney the next morning, and which I did.

Q. Who did you consult?

(Testimony of Vern Humphries.)

A. I consulted Stan McCutcheon.

Q. And what did you do then?

A. Upon his advice I went back over to the Panhandle, which was open then for business as the bar, I went in and taken the stools back off the counter, turned the stove back on and [123] started operation. I called up the wholesale supplies companies and ordered more groceries and so forth to be brought down there to operate.

Q. Now, did you get into your downstairs store-room?
A. No.

Q. You purchased another inventory, did you say?
A. Yes, I did.

Q. From whom did you purchase that inventory?

A. From Jack Barrett Grocery Supply.

Q. Did you testify that you had been operating 24 hours a day?
A. Yes, I did.

Q. And how long had you been operating 24 hours a day?

A. From the day that we opened, the 6th day of March.

Q. Had you ever had a discussion with Blackard and Starns with reference to operating 24 hours a day?
A. Yes.

Q. And when was that?

A. That was at the end of the contract.

Q. And state the discussion?

A. Well, the discussion, that they wanted the restaurant opened 24 hours a day.

Q. And did they say why?

(Testimony of Vern Humphries.)

A. Yes, because they had lots of liquor around there and so forth and that with the place open they would never be a fire and there would never be a robbery and it was good business at night too, and upon that Joe Blackard advised me to buy a Neon sign for the front window, which I did.

Q. And did you have a discussion about the Neon sign? A. Yes.

Q. And what was the discussion?

A. It was a Neon sign which stated "Open 24 Hours a Day."

Q. And where was the sign hung?

A. Hung in the front window on the side the restaurant was on.

Q. Did you have an agreement that the sign could be hung there? A. It was verbal.

Q. When and where and people present?

A. Joe Blackard and myself and Joe Blackard called up the Neon company and they came right down and the Neon man and myself with Blackard agreed to the way the sign would be made.

Q. Did the sign remain there? A. No.

Q. Where was it hung?

A. It was hung in the front window in the side of the restaurant.

Q. What happened to it?

A. Well, he rented the space out in the front end by that window to the Columbia Air Cargo and the Columbia Air Cargo put [125] their Neon sign up and Joe took my Neon sign down and hung it over the window besides the bar.

(Testimony of Vern Humphries.)

Q. And how long did it remain there?

A. Just a very few days.

Q. Then what happened to it?

A. It was placed in the storeroom.

Q. Who placed it in the storeroom?

A. Joe Blackard.

Q. Did you have a discussion about that?

A. Yes.

Q. Was it an argument?

A. It was an argument.

Q. Did he put the sign back up?

A. No, he refused.

Q. What effect, if any, did this have upon your business?

A. Well, there wasn't anything indicating that there was a restaurant there.

Q. Now, how many businesses were in the Pan-handle premises at the time you commenced operation of your restaurant business?

A. There was supposed to be three of us in there.

Q. And what was there?

A. A liquor store, a bar and a restaurant.

Q. And were any other businesses in there after a while?

A. Yes.

Q. And what businesses were put in? [126]

A. There were card tables put in for gambling, centrally located by the restaurant. There was a Columbia Air Cargo put in the front window on the side of the restaurant front and there was a cab company.

(Testimony of Vern Humphries.)

Q. Did the cab company remain there?

A. No.

Q. Do you know why they moved?

A. Yes, upon their lease they weren't supposed to sublet nothing to anybody and Mr. Campbell and Mrs. Campbell had the cab thrown out.

Q. Where were the card tables located?

A. They was in the back end of the restaurant near the counter of the restaurant.

Q. Were card games conducted?

A. Yes, they were.

Q. For money? A. For money.

Q. Who owned the card games?

A. Joe Blackard.

Q. Do you know that? A. I am positive.

Q. Did someone run the card games for him?

A. Yes.

Q. Who ran the card games for him?

Mr. Cottis: Your Honor, I object unless the witness explains [127] how this knowledge came to him.

The Court: Overruled. You may answer.

Q. (By Mr. McCutcheon): Who ran the games for Mr. Blackard?

A. There was three different parties run it, one was commonly known here in town as Red That Runs Card Games, and Mr. Preston, that was two that I know and Barney—I can't recall Barney's last name right now but he is a very well known professional.

Q. Do you know they ran the card games for Mr. Blackard? A. Knock poker.

(Testimony of Vern Humphries.)

The Court: What kind?

The Witness: Knock.

The Court: K-n-o-c-k?

The Witness: Yes.

Q. (By Mr. McCutcheon): Now, when with reference to the time you opened your business did they start the card game?

A. Immediately after we opened. I would say somewhere around the 8th or the first Saturday that we opened.

Q. Well, how long a period of time elapsed between the time you opened your restaurant business until they put card games in there?

A. About two days. They had the card tables already put in there but somehow or other they weren't opened the same night [128] we opened the restaurant.

Q. Now, what effect, if any, did the card games have on your business?

A. Right at the beginning there was a dispute between Blackard and the man who ran the card games and it was held up for about three weeks then, and then this Mr. Preston taken the card game over and when he taken it over, well, they had card games there every night.

Q. And prior to that time they had not, is that correct?

A. That is correct.

Q. Now, what kind of business did you enjoy prior to the time you had the card games?

A. We had a very good business, very good opening.

(Testimony of Vern Humphries.)

Q. I hand you a piece of paper and ask you to tell what it is?

A. Yes, it is the first month's rent. It is a receipt of the gross we had taken in and the 6% which was in the 21st days of operation which was \$203.45.

Q. Are your gross receipts shown on that paper?

A. Yes.

Q. For what period?

A. For the period—for the month of March, 1948.

Q. And how many days did you operate in the month of March? A. About 21 days.

Q. And is that paper dated? [129]

A. Yes, it is.

Q. And what is the date?

A. 8th of April, 1948.

Q. And is it signed? A. Yes, it is.

Q. And whose signature?

A. By Gottschaulk.

Q. Whose?

A. Harry Gottschaulk, an accountant here in town who handled my books.

Mr. McCutcheon: I offer it in evidence.

Mr. Cottis: Mr. Humphries, did you see Mr. Gottschaulk sign this?

The Witness: Yes, I did.

Mr. Cottis: You were in his office at the time?

The Witness: Yes, he was making out our reports.

(Testimony of Vern Humphries.)

Mr. Cottis: And it was signed on the same date that it bears—April 8th?

The Witness: Yes, I gave Joe Blackard one of them too. That is just the copy—one for me and one for Joe Blackard.

Mr. Cottis: And was this handwriting portion on it saying “Receipts made 309085, was that on there?

The Witness: Let me see? I haven’t looked at it in so long I couldn’t say. I couldn’t say just what. That is some adding figure in there, something that doesn’t pertain to this. [130] That is my handwriting but I forget what I put on there.

Mr. Cottis: Was it on there when Gottschaulk signed that?

The Witness: No, it wasn’t.

Mr. Cottis: You actually saw Gottschaulk sign this with your own eyes?

The Witness: I will swear on the Bible.

Mr. Cottis: Your Honor, we object to the introduction of this. I gather that it is presumably to show that some payment was made to Blackard and that as such it has no bearing on the case itself—no indication of payment, and otherwise it is completely irrelevant.

Mr. McCutcheon: It is not a receipt, Your Honor. The purpose of it is to show the gross receipts for that period when he opened his business—21 days.

The Court: Well, the receipt itself, as I see it,

(Testimony of Vern Humphries.)

is not admissible. The witness may search his recollection to say if he knows what he took in in the 21-day period, but it is not a receipt, as counsel has just said and doesn't show any payment to Blackard.

Mr. McCutcheon: I will withdraw the offer.

Mr. Cottis: Your Honor, Mr. Humphries referred to it in his testimony as a receipt and I fear that the jury might be misled.

The Court: Ladies and Gentlemen of the Jury, this paper is not a receipt. It is a statement signed by—appears to [131] have been signed by a man named—accountant as to the condition of the business and as to that amount of business that may be due as rental, but it is no receipt for payment of rental from the plaintiffs to the defendant, Blackard, or to Blackard and somebody else. Counsel may proceed.

Q. (By Mr. McCutcheon): State, if you can, your gross receipts for the first 21 days of your business? A. First 21 days was \$3,090.85.

Q. Now, what margin of profit does a restaurant such as the one that you operated, what margin of the gross profit?

A. Most restaurants have got to operate between a 20-22%.

Q. That is your net, is it? A. Yes.

Q. And under the terms of the original agreement Mr. Blackard was to receive how much?

A. Well, he was to receive about a fourth of the receipts.

(Testimony of Vern Humphries.)

Q. Well, how much was he to receive, what percentage of the gross? A. 6%.

Q. What does that amount to of the net?

A. About a fourth.

Q. Now, what effect, if any, did the card games have upon your business?

A. Well, it was part that I lost customers through the card [132] playing because there were workers there and the other people, that some of the workers I seen play games and get up mad at the card games and said to hell with the damn joint and I know I never seen him back and I know they were eating there permanently and as a result business began to drop off.

Q. And how much did it drop off?

A. Around \$50 a day to \$75 various days, but that wasn't altogether that helped to destroy the business.

Q. Now, were they playing cards for money?

A. Yes.

Q. What hours did they play?

A. The games were generally conducted around starting between six and seven o'clock at night and played until one.

Q. How many tables were there?

A. Three tables.

Q. Where, exactly, were they situated with reference to the counter?

A. Well, one of them—there was two sat across the back end of the Panhandle and the other one out

(Testimony of Vern Humphries.)

in front of it, which would be within about two stools of the counter. They made it impossible also to enter the storeroom to bring out meats and so forth because the gamblers—because every few minutes—because it caused a draft, so Mr. Blackard had us every afternoon to have a supply laid out in the floor so that it wouldn't cause a draft upon the gamblers. [133]

Q. How long were these gambling games carried on?

A. They was carried on until about, oh, I would say they were carried on to around the 1st of May until Mrs. Campbell brought a conviction regarding them to vacate the premises or something.

Q. Now, going back to the Neon sign, did you have a discussion with Mr. Blackard with reference to that Neon sign—hanging of it? A. Yes.

Q. Can you recall the approximate date?

A. Yes, that was somewhere around about the—that was somewhere around between the 1st and the 10th of April.

Q. What were your feelings toward one another after that discussion?

A. Well, there wasn't very good feelings.

Q. Now, at the time the Saloon part of the premises opened up, what did they sell?

A. They sold gin with beer and whiskey.

Q. And after the Neon sign incident what did they serve at the bar?

A. They gave away coffee over at the bar in the morning between 8 and 10:30.

(Testimony of Vern Humphries.)

Q. Now, what hour of the day does a restaurant ordinarily sell the most coffee?

A. In the morning around nine o'clock.

Q. And do you know why they were giving coffee away at the [134] bar? A. Yes.

Mr. Cottis: Object.

The Court: Overruled.

Q. (By Mr. McCutcheon): State, if you know, why they were giving coffee away at the bar?

A. Yes, to hurt my business.

Q. What else did they have at the bar besides coffee? What else did they have in the bar?

A. The only thing they had there was the cups, sugar and cream and spoons and the coffee in the cups, that is all they had.

Q. How long did this continue?

A. Oh, I would say between two and three weeks.

Q. What effect, if any, did that have on your business?

A. Well, that hurt quite a bit, threw quite a damper upon the restaurant.

Q. Now, with reference to the gambling games again, how did the games interfere with your business?

A. Because gamblers were located around the restaurant part, the main games was played right under where we couldn't hardly step for a card table going from our stove from the storeroom into the icebox and for perishable groceries and things

(Testimony of Vern Humphries.)

like that. And they also solicited players quite often at night at [135] the tables when people would be eating.

Q. And what was the customers' reaction to that?

A. Well, there was a few remarked what kind of a place this is. They never returned. I knew the business grew less and lesser.

Q. Now, how long did you operate your business 24 hours a day?

A. Until the 15th of April.

Q. And that is when Mr. Blackard changed the locks on the front door, did he?

A. Yes, he changed—Mr. Campbell—Mrs. Campbell served eviction papers for them to move and likewise they served papers on me to move.

Q. Did you have a key to the other lock?

A. Yes, I did.

Q. Who gave you that key?

A. Joe Blackard.

Q. Did you have an agreement with reference to the key? A. Yes.

Q. And when did you have that agreement?

A. As I taken and bought the equipment in there and started in I had a key from then on until after noon of the 15th of April and he called the locksmith up and changed the locks on the doors.

Q. Were you then able to get in? [136]

A. No.

Q. And what hours did you operate your restaurant from then on?

(Testimony of Vern Humphries.)

A. All the way from eight o'clock to ten o'clock we were able to get inside the restaurant and operate between eleven and one o'clock at night.

Q. Who determined what hours you could operate your business?

A. Mr. Blackard and Mr. Starns.

Q. And when they closed the bar you closed the restaurant, is that correct? A. Yes.

Q. What hour in the morning were you permitted to open up?

A. Most of the time—at that time they were being stubborn and they didn't open until ten o'clock in the morning.

Q. Had you enjoyed a breakfast trade prior to that time?

A. We had a good breakfast trade before then.

Q. What did your breakfast trade consist of mostly?

A. Ham and eggs, bacon and eggs, hot cakes and cereals.

Q. What class of people did you serve?

A. Working class of people.

Q. What kind of a luncheon trade did you have?

A. Working class. They stood in line at the seats to sit down to eat.

Q. Were you able to serve lunch after that?

A. No. [137]

Q. Were you allowed to open up in the morning? A. Ten o'clock.

Q. And why couldn't you serve lunch?

(Testimony of Vern Humphries.)

A. Because it takes four or five hours to prepare a luncheon out, takes two hours to heat a big range up and most of the time it was around one o'clock before we were able to resume operations.

Q. What was your average gross receipts for breakfast?

A. Oh, I would say somewhere around between \$25 and \$40.

Q. And what was your average gross receipts for lunch?

A. I would say our average gross was around \$60.

Q. What was your average gross for the days prior to the time you were compelled to close up for lunch and breakfast?

A. From \$160 to \$200.

Q. And what do you base that statement?

A. I base that upon monthly—some days we did better than others but on the average of 21 days, about \$3500 would average out around \$175.00 a day.

Q. Now, what was the effect on your business of losing lunch and breakfast trade?

A. Well, we finally ended up doing about \$40 a day business, sometimes as low as \$25.

Q. Did you ever ask Mr. Blackard for the key to the front door? A. Yes. [138]

Q. And did he give it to you? A. No.

Q. What kind of a credit rating did you have when you opened the business?

A. I could go anywhere in town and buy anything I wanted.

(Testimony of Vern Humphries.)

Q. What kind of a credit rating did you have when you closed your business?

A. I couldn't borrow a penny.

Q. Do you know why your credit rating suffered? A. Yes, I do.

Q. Why did it suffer?

A. It suffered because Joe Blackard maliciously called up different people around and said he was throwing me out, that I didn't have anything and that he was foreclosing.

Q. Who did he call?

A. He called Jack Barrett up, for one that I know. He called him a number of times on the 'phone.

Mr. Cottis: I object as hearsay, your Honor, unless Mr. Humphries testifies as to how he knew that. I am sorry I don't object as hearsay, it is something without his knowledge.

Q. (By Mr. McCutcheon): How do you know that? A. Mr. Barrett told me.

Mr. Cottis: Then I object to it as hearsay.

The Court: The jury is instructed to disregard that [139] testimony as it being hearsay.

Q. (By Mr. McCutcheon): Now at the time your business was closed—on what date did you close your business.

A. On the 21st day of May.

Q. What did you do in connection with that?

A. I put padlocks on the doors.

Q. On what doors?

(Testimony of Vern Humphries.)

A. Both storeroom doors.

Q. How many storerooms did you have?

A. I only had one big storeroom and I had a little hallway like that I had a big icebox.

Q. What was the approximate value of your inventory in the large storeroom at the time you put the padlock on it?

A. It was right at \$1900.

Q. And did you have another storeroom, did you say?

A. Yes, I did.

Q. And where was that storeroom located?

A. It was upstairs in back of the restaurant.

Q. And what did you do in connection with that storeroom?

A. I placed the padlock on it.

Q. And what date was that?

A. That was on the 21st day of May.

Q. And what was the value of the inventory contained in that storeroom? [140]

A. Around \$2,000. I called the United States Marshal down and asked his advice upon the padlock of the doors until we had this straightened out.

Q. And did Mr. Blackard offer to purchase those supplies?

A. No, he refused to buy them and refused to let me sell.

Q. And did you attempt to sell them?

A. Yes, I did.

Q. Did you attempt to sell the business?

A. Yes, I do.

Q. And to whom?

(Testimony of Vern Humphries.)

A. Mr. Guyron. I had the business sold for \$9,000 plus inventory and I brought the man to your office to close the deal and called Mr. Blackard up there and in his presence Mr. Blackard said "No, there would be no deal."

Q. And what then happened to the supplies?

A. I went to the Grocery Wholesale Supply, I owed for some groceries and asked if they would pick up the groceries down there and Joe Blackard refused to let them come in and take groceries out.

Mr. Cottis: Object, your Honor, unless he knows that of his own knowledge.

The Court: How do you know that?

A. They told me.

Mr. Cottis: Objection as hearsay.

The Court: Objection is sustained. Jury is instructed [141] to disregard the testimony as to what somebody else told the witness.

Q. (By Mr. McCutcheon): What did you do with your equipment when the premises was closed?

A. I left the equipment there.

Q. What happened to the equipment, do you know?

A. Yes, it was reopened by Joe Blackard and operated.

Q. Now, did your original agreement contain a covenant with reference to heat, light, fuel?

Mr. Cottis: Object, your Honor, on the grounds the agreement speaks for itself.

Mr. McCutcheon: We will get it out.

(Testimony of Vern Humphries.)

The Witness: Here it is.

Q. (By Mr. McCutcheon): Well, what did the agreement contain?

The Court: You may read it. Don't state your own interpretation of it.

Q. (By Mr. McCutcheon): Read that portion of the agreement that relates to heat, light and fuel?

A. "Blackard agrees to furnish the space, light, heat and water necessary for such operation and to provide the utensils and equipment now on the premises. Humphries represents that he has examined the foregoing and is satisfied herewith."

Q. What equipment did he provide you with, if any?

A. One stove that originally, I guess, I don't know who owned it but it remained in there.

Q. What else?

A. Some cooking utensils and varied and different kinds of pans, a few dishes which wasn't enough for an operation, so I just stored all that stuff. I never did take a close inventory of it.

Q. Now, did Mr. Blackard pay for the heat?

A. No, sir.

Mr. Cottis: Your Honor, I object to that question and answer unless it is clarified. There are two kinds of heat involved here, one for the premises and one for cooking stoves and that sort of thing.

The Court: Overruled.

(Testimony of Vern Humphries.)

Q. (By Mr. McCutcheon): What kind of heat was agreed to that Blackard should furnish?

Mr. Cottis: I object, your Honor, because the agreement speaks for itself on what kind of heat was to be furnished.

Mr. McCutcheon: I am caught between coming and going. First he asked for an explanation and then insists that the agreement speak for itself.

The Court: The witness may testify what was said by the parties. He may not put his own construction upon it. That [143] is a matter of argument to the jury.

Q. (By Mr. McCutcheon): What was said by the parties in connection with that covenant of the agreement?

A. Blackard was supposed to furnish the space, heat, light——

Mr. Cottis: Object, your Honor, until it is pinned down where this conversation took place.

The Court: The objection is well taken. First state the time and place and who was present and then state what was said?

The Witness: This was agreed upon even from the beginning of Mr. Cottis' own writing of the contract, that wasn't developed and finally ended down to this original one here. The same thing remained in it that they were supposed to furnish the space, light, heat and water necessary to operate a restaurant upon a 6% which Joe Blackard was supposed to furnish the material for that part for the higher rent.

(Testimony of Vern Humphries.)

Mr. Cottis: I object to that portion of that part of his answer that says "Joe Blackard was supposed to do this." If he wants to give the substance of any conversation I will make no objections, if it was after the agreement or if they leave any ambiguity in the agreement about his conclusions as to what Joe was supposed to do, I object to it.

The Court: That objection is well taken. What anybody is supposed to do is not testimony. The testimony of an oral agreement is what the parties said. What did he say to you [144] and what did you say to him and when was it said and who were present?

The Witness: Joe Blackard and myself present and we was discussing heat. I was going to rent it out for \$250 a month——

Mr. Cottis: Your Honor, I don't like to be obnoxious but may I have where and when the conversation took place?

The Witness: It was either the second or third day of February of 1948. We sat down and kind of went over similar to a contract which we were supposed to agree to and we agreed upon that I would take and pay a percentage or pay not less than \$200 a month. Mr. Blackard agreed to take and pay of the lights, space and so forth in there, to furnish that upon this 6%. He then taken the notes down and taken them to your office and then the contract was written up.

We brought the agreement then back to Mr. Stan

(Testimony of Vern Humphries.)

McCutcheon's as for his approval upon me signing it and there was a few other things that was in there that I didn't approve of and it didn't state clearly to me so I asked that a simple contract be written up. So Mr. McCutcheon wrote this up with the same conditions upon the space and the light and the heats and so forth like that to be furnished.

Q. (By Mr. McCutcheon): May we have our usual recess now, your Honor?

The Court: Court will stand in recess until two minutes past four. [145]

(Short recess.)

The Court: Without objection from counsel the record will show all members of the jury present.

Mr. Cottis: Your Honor, will there be any chance of determining at this time how much longer the plaintiff's case will last? I have a client that would like very much to be out of town for tomorrow only and I understand the Court will be in Cordova on Friday and I wonder if plaintiff's case will close tomorrow fore-noon?

The Court: Mr. McCutcheon will be able to tell us something about it.

Mr. McCutcheon: I doubt it very much, your Honor. I think probably it will go on all morning and probably part of the afternoon—plaintiff's case.

The Court: Plaintiff's case, that is, including cross-examination?

Mr. McCutcheon: Yes, sir.

(Testimony of Vern Humphries.)

The Court: I presume that counsel will not care to waive cross-examination of any of these witnesses?

Mr. Cottis: No, your Honor. Am I correct in recalling that the Court will be in Cordova on Friday?

The Court: Yes, the Court will be in session in Cordova on Friday and Saturday and it will return Sunday and will be in session again here on Monday.

I assume from what counsel have just said that there is [146] no chance of finishing the case tomorrow. I said that we might finish it tomorrow but it looks as though it might take most of tomorrow to put on plaintiff's case and, therefore, counsel, unless the witness he refers to is his own witness may be safely excused until next Monday.

Mr. Cottis: Thank you, your Honor.

The Court: I assume it will take sometime to put on the defendant's case aside from this witness to whom counsel has referred?

Mr. Cottis: That is correct, your Honor.

The Court: Well, we know that virtually the first witness—I believe we did have Mr. Hoff on the stand—this is practically the first witness and he is still on direct examination and he has been so since 10:20 this morning, about. Counsel may proceed. I am not trying to hurry counsel.

Q. (By Mr. McCutcheon): Who paid for the lights while you were in business, Mr. Humphries?

A. I did.

(Testimony of Vern Humphries.)

Q. Who paid for the heat while you were in business? A. I did.

Q. Who paid for the fuel while you were in business? A. I did.

Mr. Cottis: Your Honor, I object to these questions unless they are clarified as to what heat, what lights and what fuel? [146]

The Court: Counsel will have the right to cross-examine and clarify them. It may be well to clear them up now. What do you refer to by "lights, heat and fuel"?

The Witness: I paid for the lights on the Panhandle Restaurant.

The Court: And heat?

The Witness: For the Panhandle Restaurant.

The Court: What do you include in "heat"?

The Witness: For the cook ranges and also it heated the inside of the restaurant.

The Court: And the space around the restaurant?

The Witness: Yes, at that time the furnace was broken down and there was no heat in there except the heat from the restaurant range.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): Did you ever have a discussion with Mr. Blackard with reference to the payment of the lights? A. Yes.

Q. And when and where and in whose presence?

A. The first I knew he wasn't going to pay for them was when our lights were turned off at 12 o'clock. Mr. Blackard had them turned off and I rushed down to see what was the matter at the City

(Testimony of Vern Humphries.)

Lights and they said "You have never paid your light bill." I ran back and got the contract and they called [148] Joe Blackard up on the 'phone "Here under your agreement you are supposed to have the deposit up here" and Joe Blackard agreed that he would come back later and settle it so they wouldn't turn the lights on. So I made the deposit.

Q. How much of a deposit did you make?

A. I made \$240.00.

Q. I hand you a piece of paper and ask you what it is?

A. That is a check that I gave to the City of Anchorage.

Q. What is the date on it?

A. The date on it is April 20, 1948, Bank of Alaska.

Q. Who is it signed by?

A. It is signed by Alaska Food Service, Vern Humphries.

The Court: Is there objection?

Mr. Cottis: Object to the relevance, your Honor, unless it is connected up later.

The Court: Objection is overruled. It may be read.

Mr. McCutcheon: Will counsel stipulate that the reading of the check be waived?

Mr. Cottis: Certainly.

Q. (By Mr. McCutcheon): You testified you put locks on your supply room at at the time you closed your business down, did you, Mr. Humphries?

(Testimony of Vern Humphries.)

A. Yes, I did.

Q. Did those locks remain there? A. No.

Q. Who removed them?

A. They were broken off by Joe Blackard.

Q. Do you know it of your own knowledge?

A. Yes.

Mr. Cottis: —and unless he shows how he knows it?

Q. (By Mr. McCutcheon): How do you know it?

A. I came to the restaurant, the lock was off and the groceries and meat was loaded on a black truck in the back of the Panhandle that belonged to Jack Guard. I rushed up to the United States Marshal and brought him down. The locks were broken and the United States Marshal says "Who broke them?" "I broke them myself" he told me and he told the Marshal—the Marshal said "You get locks and put back on there and put the stuff back in the storeroom."

Q. What was on the trucks?

A. Meats and chickens and groceries.

Q. And what happened to them?

A. They was ordered to put back into the storeroom.

Q. And were they put back in the storeroom?

A. They was thrown back in.

Q. How long did they remain back in the storeroom?

A. Later on I came back down and the meat was not put back into the freezers. They was placed

(Testimony of Vern Humphries.)

on a cupboard there that was in the storeroom and also on the floor and in the sawdust [150] and so forth like that.

Q. And did the Territorial Health Inspector appear on the scene at that time?

A. Yes, and Joe Blackard called me a Health Inspector down and showed him, Marvin Campbell and myself and we seen the meat on the floor and all over the sawdust. We put it back into the ice-box. We knew it wasn't fit then to use but we still knew that it was ours and it was paid for and that we wanted to show to some legal authority how he was destroying our stuff. Then Joe Blackard had called, in the meantime had called, Mr. Moon——

Mr. Cottis: Object unless Mr. Humphries knows of his own knowledge.

The Witness: I know it of my own knowledge. I talked to Mr. Moon and seen him there.

Mr. Cottis: Object to as hearsay.

The Court: Overruled.

The Witness: I talked to Mr. Moon.

Q. (By Mr. McCutcheon): Did you get your information from Mr. Moon that Mr. Blackard had called him? A. From both of them.

The Court: If you got them from Blackard——

The Witness: Yes, Blackard said he called Mr. Moon. He told the Marshal also and the Marshal then condemned the stuff, which anybody would condemn. [151]

Q. (By Mr. McCutcheon): The Marshal or the Inspector? A. The Inspector.

(Testimony of Vern Humphries.)

Q. And then what happened?

Mr. Cottis: Object to the leading questions.

The Court: Overruled.

The Witness: He told me to destroy the meat.

Q. (By Mr. McCutcheon): What happened to them?

A. I don't know, the last I seen they were throwing it on a truck. But the place was already closed down and had been closed down for several days and padlocks on the door. We weren't in business of operating a restaurant.

Q. Now, it states in Defendant's Exhibit "A" that you have failed to comply with the law and that you illegally had moose meat on the premises. Now, were you arrested for having illegal moose meat?

A. Yes, sir.

Q. And when was that?

A. That was on the—it was somewhere around the 14th of April.

Q. And how long after Mr.—was it before or after Mr. Blackard served this notice on you?

A. It was just before.

Q. How long before?

A. It was one day before, I am sure. Wait a minute, I believe that it was either—it was the 12th or 13th of April. It was possibly two days before.

Q. That you were arrested for having illegal moose meat?

A. Yes, sir.

Q. And did you plead guilty to that charge?

A. Yes, I did.

(Testimony of Vern Humphries.)

Q. And did you pay a fine? A. Yes, I did.

Q. How much of a fine did you pay?

A. \$300.

Q. And were you guilty? A. No, sir.

Q. Now, how does it happen that you pleaded guilty if you weren't guilty?

A. Because on this night in the afternoon, well, I rented my car out——

Q. Just a moment, did you have a discussion with Holger Larsen with reference to pleading guilty?

A. Yes, I did and he advised me——

Mr. Cottis: Objection, your Honor, on the grounds of hearsay.

Q. (By Mr. McCutcheon): Did you then plead guilty? A. I pleaded guilty. [153]

Q. And paid a fine?

A. Paid a fine of \$300.

Q. And why did you plead guilty?

A. Because right at that time I could not prove my innocence.

Q. Any other reason?

Mr. Cottis: Objection, your Honor, he is leading the witness.

The Witness: Yes, I stood a chance of loosing my car because it was found not in the Panhandle premises because it was found in the back end of my car in the alley in back of the Panhandle. I stood a chance of loosing my car and taking a fine of about \$500 and a sentence to jail.

Q. (By Mr. McCutcheon): How do you know that?

(Testimony of Vern Humphries.)

A. Because Holger Larsen told me.

The Court: Wait a minute, you are going too far. Counsel objected.

Mr Cottis: Yes, your Honor.

The Court: Objection is sustained.

Q. (By Mr McCutcheon): Did you know at that time how the moose meat got in your car?

A. No, sir.

Q. Do you now know how the moose meat got in your car? A. Yes, I do. [154]

Q. Who put it there? A. Joe Blackard.

Q. Do you know that? A. I know that.

Mr. McCutcheon: Your witness.

Mr. Cottis: Your Honor, I object to the last questions and ask that they be stricken unless he explains how he knew that.

The Court: Motion is denied.

Mr. Cottis: What was your Honor's ruling?

The Court: Motion is denied.

Cross-Examination

By Mr. Cottis:

Q. How do you know Joe Blackard put it there?

A. Because Joe Blackard had borrowed my car on this same afternoon at 4:30. Joe and he had used my car until——

Q. Joe and who?

A. Joe Blackard had borrowed my car and used it until about 15 minutes of my arrest. It was on the night I was supposed to get the payroll checks

(Testimony of Vern Humphries.)

from the bookkeeper and I proceeded to go out to the car. Joe had come into the place and said "Your car is out there." In a few minutes when I went out to the car with Marvin Campbell, just as we approached the car parked in the back of the Pan-handle two officers and Joe Blackard steps [155] out and says "Put your hands in the air." We put our hands in the air, not knowing. I started to put my hands down and was ordered to put them back up again. We stood there for a matter of about 30 minutes and Mr. Larsen, the Game Commissioner, showed on the scene and Joe Blackard then right at that time he tossed his gun over the fence and he wanted to know what the city police—what all the disturbance——

Q. My Humphries, are you responding to my question?

A. I am answering, you asked me how I know.

Mr. McCutcheon: I submit, your Honor, that he is answering the question.

Mr. Cottis: That is all I want to know.

The Witness: So Mr. Larsen wanted to know what kind of meat, where was it at and so forth and Mr. Blackard ran over to my car and opened the trunk of the car and he said "See, see, here it is." So I was arrested. Right at that time I didn't know who even who had turned me in but a few minutes later I did know who turned me in, who had reported. Mr. Blackard when he brought my car back reported to the police.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): How do you know, that is the question?

A. The only way I know is by the police telling me so.

Mr. Cottis: Your Honor, I ask that the answers be stricken out as not responsive and his answer to Mr. McCutcheon be stricken out as hearsay and matters not within his knowledge. [156]

Mr. McCutcheon: I was afraid Your Honor was going to rule before I could be heard. I apologize for the interruption.

The Court: Motion is denied because most of the answer and all except the very last part is directly responsive to the question and is competent and relevant, admissible. The last part that the policeman told him something may be stricken, because that is hearsay. The jury is instructed to disregard the statement of the witness as to what the police told him, otherwise the answer stands.

Mr. Cottis: Your Honor, I dislike to belabor the point but I would like to state one further thing. My objection is also based on the ground that it is a conclusion of the witness and I grant you the answer is responsive as to how he formed that conclusion but his conclusion itself is inadmissible.

The Court: No, it is true that the witness didn't testify to seeing it but the witness testified to a set of circumstances which, I think, may properly go to the jury. It is up to the jury to determine,

(Testimony of Vern Humphries.)

whether in the first place, the credibility of the witness, of course, as with all witnesses; in the second place whether under the circumstances anybody is justified in believing that Blackard is the one who is responsible for the moose meat being in the car. That is a question for the jury. I think it is a matter in which the jury may draw legitimate inference in one fashion or another and, of course, that inference is for the jury alone, and the Court would [157] would be entirely out of order to express any opinion upon it. But the testimony may go to the jury.

Q. (By Mr. Cottis): Now, Mr. Humphries, what was the date that you lent Blackard your automobile? A. 13th of April.

Q. Could it have been the 14th?

A. No, it was—I remember very correctly.

Q. And it could not have been the 12th?

A. I am sure that it was one of the dates. It was about two days before. I know it was either the night of the 12th or the 13th and I am pretty sure it was the 13th instead of the 12th, but it was one of the two days.

Q. At that time you had been operating the restaurant for little over a month, is that correct?

A. That is correct.

Q. Now, during the first three weeks, I believe you stated, there was no card playing on the premises? A. Something like that.

Q. And then for the next week and one-half there was card playing, is that right?

(Testimony of Vern Humphries.)

A. It was longer than a week and one-half then, it was somewhere in there. It was card games going after we first opened there the 6th of March.

Q. And I believe you stated that it was prior to April 15th [158] that the storeroom was locked?

A. Yes, sir.

Q. And you are sure that that was before April 15th?

A. I am sure it was.

Q. Was that before——

A. I am sure it was right on the day of the 15th.

Q. It was on the day of the 15th?

A. Yes, sir.

Q. Was not prior to the moose meat affair?

A. It was right after the moose meat affair.

Q. Now, you stated, did you not, that the Neon sign was removed?

A. Yes, I did.

Q. And when did that occur?

A. Well, that occurred somewhere right along in there, too. It all occurred in the early part of April.

Q. Can you place it with respect to the moose meat matter?

A. Can I replace it with respect to the moose meat matter?

Q. No, can you place it with respect to the sign removal?

A. Yes, because there was a funny situation there, the day before the moose meat the sign was taken down and Mr. Blackard had a fight, quite a quarrel, that we left not on very good speaking terms and then he walked in and asked to borrow

(Testimony of Vern Humphries.)

my car the next day. I turned around to Mr. Stan Kearney, who was standing behind me and I said "That takes a lot of nerve" but [159] I let him use my car.

Q. And that was a day after the quarrel with Blackard? A. Yes, sir.

Q. Had Blackard borrowed your automobile often?

A. Yes, Blackard to begin didn't have a car. Later on Mr. Starns gave him his.

Q. On the other occasions that Blackard had borrowed your car had there ever been moose meat in it? A. No, sir.

Q. It is true, isn't it, Mr. Humphries, that for sometime you served moose meat in that restaurant prior——

A. There never was any moose meat served in my restaurant.

Q. You never obtained any moose meat from Palmer? A. Absolutely not.

Q. Did any one in your employ?

A. No one in my employees, to the best of my knowledge, would stoop to do it.

Q. How long had Harry Gottschalk taken care of your books?

A. He had taken care of most of them all the way through excepting the last in May he didn't get—have him, he didn't take our receipts. Mr. Campbell then became a partner helping me around there, more or less a partner at the time, and he is

(Testimony of Vern Humphries.)

a bookkeeper and I was turning it over and Mr. Campbell was setting up another set of books to save that \$100 a month fee.

Q. What do you mean "Mr. Campbell was more or less * * *"? [160]

A. Mr. Campbell before that was working for me and I made Mr. Campbell a proposition to become a partner.

Q. When was that that you made that proposition?

A. That was somewhere around about the—I would say—I would say that taken place somewhere around the 1st of April.

Q. And you were partners after that, were you?

A. Yes. There was no written thing on it; it was just all verbal.

Q. When Havins sold his interest in the contract with Blackard to Jones did you agree to that sale? A. Yes.

Q. Do you know what the purchase price was?

A. Yes, \$500.

Q. That \$500 bought a half interest in the business conducted by you and Havins?

A. No, it didn't.

Q. What interest did it buy?

A. It only bought a fifth, but he was to work it out as his wages accumulated there, so much of his wages outside of his living expense was supposed to go to me until such time as he had me paid up.

(Testimony of Vern Humphries.)

Q. Until he had the \$500 paid up?

A. No, until he had his half of \$2,500.00 paid up. He put in \$500 and was expecting to get more money to go into the business and it went along for about 3 weeks and he so far hadn't succeeded in getting [162] the rest of his money so we agreed upon him paying me off and taking it out of wages until him and Mr. Blackard got in a quarrel and Mr. Blackard asked me if there couldn't be something done about getting him out of the way. And so Richard Jones came by and Mr. Blackard and myself agreed that Richard could buy the place—was a nice buy. He had worked down here at the railroad.

Then Mr. Jones was there for about three weeks until Mr. Jones had to knock down one of the gamblers to get him away from his wife, trying to insult her there at the counter. Mr. Blackard was going to terminate the lease or Jones must go and so, keeping things down at the time, I paid Jones money, paid him \$20 a day for his labor for what time he was in there.

Q. And that resulted in this release that you put into evidence? A. In what lease?

The Court: I think the word was "release."

The Witness: It is just one sheet of paper. I know now what you mean.

Q. (By Mr. Cottis): How long did Havins operate with you?

A. Havins operated up until about a week be-

(Testimony of Vern Humphries.)

fore we opened. I say somewhere around, maybe. It was around the 20's of around February; it was around the 28th, but I can't recall the exact date. [162]

Q. Anyhow it was toward the end of February?

A. It was within a few days of when we opened and we opened on the 6th of March.

Q. Will you tell how you came to break up with Havins?

A. Mr. Blackard said he didn't care for him and he said he had seen he wasn't any part of a restaurant man and in that respect Blackard was true. But him and Havins there was quarreling so we eliminated him. But Havins we gave him back his \$500 when he asked for it. He hadn't spent no money or helped remodel the place or anything. He was out here and he was just let off the police force or quit the police force.

Q. That was about the end of February in there, about the 28th? A. That is right.

Q. At that time you gave back Havins' \$500 and took in Jones for \$500?

A. No, Richard Jones paid him.

Q. Directly?

A. Directly. There was some transaction in Stan McCutcheon's office, which I don't know that I ever went into at the time.

Q. And then you and Jones operated for about three weeks? A. Something like that.

Q. And then you bought Jones out?

(Testimony of Vern Humphries.)

A. Yes, I did.

Q. And the nature of that purchase was to pay Jones, in effect, [163] for the labor, for the time that he put in with you?

A. Jones had \$500 paid toward the equipment and he had worked such time that it amounted to \$250 or \$260, something like that, it was over \$200. So then I gave Jones \$750 or 60-dollars and Jones was very happy, which he is back down at the railroad and I am sure he would tell the same story.

Q. Where was Havins when you bought Jones out?

A. Havins—where was Havins?

Q. Yes, was he around?

A. Yes, Havins was around.

Q. But your dealings with Havins and Jones' dealings with Havins had been completed toward the end of February?

A. With both of them, you mean?

Q. Well, Jones' purchase from Havins was at the end of February?

A. Yes.

Q. And your agreement, whatever it may have been, that Havins would no longer associate himself in the business was toward the end of February?

A. Yes.

Q. Did you have any further transactions with Havins with respect to this business?

A. Transactions? No, I never had no more transactions with him, no.

Q. Will you explain to me why Havins executed Plaintiff's [164] Exhibit No. 5, which is dated March 26th?

(Testimony of Vern Humphries.)

A. Yes, upon March 26th is when I bought Mr. Jones out and at that time I hadn't seen the paper that was supposed to have been left up where Jones had paid Havins for his part and I called Mr. McCutcheon up on the 'phone and asked him would he—Kenneth Havins was leaving town and that I wanted to clear a bill of sale that they held no obligation against me whatsoever and they both went across the street and signed it.

Q. Although you had had no dealings with Havings since the end of February?

A. Except that I had him sign a release that I would have in my possession in case anything ever came up, and this is it.

Q. And then you operated alone for a while or with Mr. Campbell as an employee, is that correct?

A. That is correct.

Q. About how long was that relationship in effect?

A. I would say, right off hand I would say he was working there, Mr. Campbell was working for me and began work on the 6th day of March as a dishwasher and he remained a dishwasher until somewhere around about the 1st of April, to my best knowledge.

Q. And then at that time why you went into partnership with each other? A. Yes.

Q. Would you care to state the terms of your partnership [165] with Mr. Campbell?

A. Yes.

(Testimony of Vern Humphries.)

Q. Will you please?

A. Yes, Mr. Campbell was going to be down there in the evening and I had noticed his work and his ability and that I knew above all things that he is very honest and conscientious boy. However, Mr. Blackard was opposed to him being there also, but he stayed. And I was in my car and had a flat tire and I mashed my finger off on a bumper jack. I was laid off for about a week. I turned all my business over to Mr. Campbell when I was up. I said, "I am going to tell you what I am going to do with you. How would you like to become a partner in this with me?"

Q. Did Mr. Campbell pay you anything for his interest?

A. I borrowed from Mr. Campbell. I borrowed somewhere around \$450 from Mr. Blackard and upon the 6th day of March Joe Blackard needed his money and I borrowed at that time \$500 from Mr. Campbell to pay Mr. Blackard back and I in about ten days then I paid Mr. Campbell back.

Q. And that was that Mr. Campbell put into the partnership—that loan to you?

A. No, it wasn't. Mr. Campbell would stand from then on as a partner and I would give him half to go. I needed somebody as a partner. I knew I would be laid up for six or seven more months because I had to go outside and have this wound attended to. I had blood poison. And I said, "I will take and give you [166-167] this and you run it."

(Testimony of Vern Humphries.)

Q. So, because of the fact that he was going to run the business while you were outside?

A. I made him a partner.

Q. You made him a partner. And he didn't have to put in any cash because his services were going to be payment for his share of the partnership?

A. His payment of what? I didn't get that?

Q. His payment for the share of the partnership?

A. He didn't have no payment to make.

Q. That is what I mean. Was there any written partnership agreement between you?

A. No, sir, there were not and we are still in partnership now back east and we don't have any written.

Q. You are still partners and you still have no written agreements?

A. Yes, sir.

Q. Where are you operating now?

A. We are operating a little place in Kansas right now.

Q. How long have you been operating there?

A. Well, since about latter—about the first of August of last year, when we had a sudden flood here about six weeks ago and I was washed away, and almost washed away ourselves.

Q. And are you both residing there yourselves too, do you both live there? [168]

A. Yes, sir.

Q. So from the first week of April on, Mr. Campbell was a full partner with you?

A. Something like that.

(Testimony of Vern Humphries.)

Q. And under your oral arrangement you were to split the profits and losses fifty-fifty?

A. That is right.

Q. As you were equal partners in the business?

A. That is right.

Q. In connection with your partnership agreement, your oral arrangement with Mr. Campbell, was there anything in connection with the eviction action against Blackard from the Panhandle premises?

A. Now, will you state that again, I didn't quite grasp it. I was thinking.

Q. Was any portion of the arrangement that was made between you and Mr. Campbell concerned with the eviction action which was shortly brought into Blackard?

A. No, sir.

Q. There was no deal between you that if Mr. Campbell came in as a partner——

A. No, I was planning on going out to the States and Mr. Campbell was going to stay in the restaurant until I got back and whether he was going to remain in or not it was never discussed. [169]

Q. Mr. Humphries, I show you what purports to be the amended complaint in the cause that is now being tried, Cause No. A-4979, and ask that you tell me the filing date as shown by the Clerk's stamp on that amended complaint?

A. Now, it is May 7, 1948.

Q. And I ask that you read paragraph 3 of that amended complaint. Will you read that aloud?

(Testimony of Vern Humphries.)

A. "That on or about the 4th day of February, 1948, at Anchorage, Alaska, defendant, Joseph Blackard, entered into a lease agreement with plaintiff, Mr. Vern Humphries, whereby defendant agreed to lease to plaintiff Vern Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Joseph Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for said operation, a copy of said lease being attached hereto and made a part of this amended complaint, marked 'Exhibit A.'"

Q. Now, on the 4th page of the complaint whose signatures appear under the verification stating that the complaint is true?

A. On which one, now?

Q. Here.

A. Vernon Humphries and Marvin Campbell.

Q. And you read the complaint before you signed it?

A. Yes. [170]

Q. Now, on Exhibit "A" which follows I wish you would compare for me the Exhibit "A" attached to the complaint that was filed May 8th, that complaint there, and your Exhibits 2 and 3 and take your time and tell me whether they are identical so far as wording goes or whether they are not. This is your Exhibit 2 with your interlineations that you recall and this is your Exhibit 3, which was attached to the complaint in Cause of Action

(Testimony of Vern Humphries.)

5001, now would you compare your Exhibit 3 and your Exhibit 2 with this exhibit attached to your complaint in this action and tell me whether they are the same or not? A. Exhibit 2 is which?

Q. Exhibit 2 is this.

A. I still don't quite follow you.

Q. You will recall, Mr. Humphries that we have now in evidence two different agreements—one of which has these interlineations in it and one of which doesn't and both of which have been signed?

A. Yes.

Q. I would like to know whether the agreement——

A. This one is a copy of the original or this one or this.

Q. Exactly.

A. I know positively that this is a copy of the original.

Q. That is, that Exhibit 2 is a copy of what?

A. The original.

Q. Well, it is an original isn't it? It is signed by everybody? [171]

A. But it was amended though and retyped up and was resigned over, you remember, this one.

Q. Well, we have not yet produced the signed copy of the retyped exhibit have we or the retyped agreement?

A. Mr. Blackard must have had one. I had one but I couldn't explain—as near as I can explain is what happened to mine. I had half of my furni-

(Testimony of Vern Humphries.)

ture stolen as well out of my home. We left everything up here, expecting to return, and a fire happened and everything was destroyed out of the house even the beds, but what happened to Mr. Blackard's I don't know, but this is the one we agreed upon for a final paper to be typed and signed.

Q. Vern, you are getting off the track here a little. Is this one that is attached to your Complaint in 4979, is that a copy of this or this or of Exhibit 1?

A. I still don't quite get it.

The Court: I don't want to interfere with counsel's cross-examination, perhaps the use of leading questions would shorten it up, I don't know, whatever counsel desires to do can be done because he is conducting his own cross-examination.

Mr. Cottis: Thank you your Honor.

Q. Vern, this is the first agreement that is put in evidence and it is marked Exhibit 1. Now, this is a signed copy of the agreement which you testified that this Exhibit 2 with the penned in interlineations is really the final agreement, do you [172] remember that? A. Yes, sir.

Q. Which of these agreements is attached to your Complaint which was filed on May——

A. It is a copy of this one.

Q. It is a copy of Exhibit 2?

A. My attorney made out the papers and I am pretty sure they are in order.

Q. When you signed this Complaint here, how did you know that this was true copy of the agreement?

(Testimony of Vern Humphries.)

A. Because Mr. McCutcheon had this here to go by.

Q. He had this interlined one?

A. Yes, sir, and I am sure that he had the original one which was at one time at his office but I think I took it back to the house. I can't find it and I don't know, so I just can't hardly answer you, but he must have went by either this or the original.

Q. Vern, you didn't sit down and compare this with this word for word when you signed the Complaint?

A. No, I relied upon Mr. McCutcheon for most of it. I outlined what I wanted and what had happened and so forth and it was typed up and it was signed and if there was an error I am sorry.

Q. You still can't recall who made these interlineations here? [173]

A. Yes, well, I won't say because it is rather difficult to say which one did. I know positive that it wasn't me but there was four of us there and I wouldn't swear now because there was nothing that stood out then from my mind to function on it to say what happened.

Q. You testified that about two weeks after that was signed—that would be 14 days after February 4th, around February 18th, plus or minus—you had another conversation with Blackard and Starns and I can't recall whether McCutcheon was there or not, and you orally modified that agreement. You

(Testimony of Vern Humphries.)

changed certain aspects of it. For example you waived the requirement that you furnish a \$3,000 bond, do you remember that testimony?

A. Yes, we didn't—we just demanded that certain principles in this one, which was, I was going to hold for my 18 and they bargained with me and made me an offer and likewise we agreed upon it if they moved and stood the expense of moving the restaurant further back, that they could have the space there and that the bond was waived by Mr. Blackard.

Q. Just a minute, Vern, will you place that conversation for me, did that take place in the Panhandle?

A. It taken place in the Panhandle.

Q. And about when was it?

A. It was somewhere around, I believe, around the 9th or the 10th.

Q. Of February? [174]

A. Of February it was or it could have been a few days—yes it was more than that, I would say it was towards the latter part of the month.

Q. After February 25th, do you think?

A. Oh, it was before that. Yes it was positive before that. It was way before that; it was when Mr. Starns was building his liquor store and he started building somewhere around, I believe, the 10th of the month and it was very shortly right in there. Right now I can't recall, my mind is getting tired. I can't quite recall whether just the

(Testimony of Vern Humphries.)

day it was on, but it was right in there sometime around the 10th and the 15th in there somewhere.

Q. Would you rather adjourn now? I mean are you feeling actually tired mentally?

A. Well, I have been up here all morning. Yes, I am tired but I will do my best.

Mr. Cottis: I have no objection, your Honor. I don't want to tire the witness and I am going to cross-examine him at some length.

The Court: Mr. Humphries looks like a young and vigorous man.

Mr. McCutcheon: I was about to say I was tired too, if counsel wants to go home, if he wants to ask me?

The Court: I think the unanimous thought—Mr. Cottis hasn't expressed himself yet—but I gather he is not averse [175] to adjourning.

Ladies and Gentlemen of the Jury, we will suspend at this time until tomorrow morning at 10 o'clock and you will remember the provision of the law which forbids you to discuss the case among yourselves or with others or listen to any conversation about it or to form or express an opinion until it is finally submitted. Maybe it would not be inappropriate for me to refer a moment to the forming of an opinion. I think all human beings are a bit inclined to form an opinion about a thing without knowing all there is to know about it, and so you will try to bear that in mind. Do not make up your minds as to the merits of the case until

you hear all of the evidence, all of the arguments of counsel and, also as to law the instructions of the Court, and then you will be in better position to do justice.

The Jury may be excused until tomorrow at ten o'clock.

(Whereupon, at five o'clock, p.m., Wednesday, May 22, 1949, the case was recessed until the following morning at ten o'clock, a.m.)

Thursday, June 23, 1949

The Court: Clerk will call the roll of the jury in the box.

(Names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Mr. Humphries may resume the stand. Counsel may proceed with the examination.

Mr. Cottis: I wonder if the Bailiff would move the blackboard over here.

The Court: I should advise counsel that for a year or more I have not permitted any blackboard illustrations by witnesses or others for the reason that they are not permanent and any drawings should be made on paper so that they may go in as exhibits, if that be desired, and in the event of appeal they will be available for the Appellate Court. I understand that we have here some large sheets of paper and the drawings should be made upon the paper rather than the blackboard because the blackboard drawings are erased and then all

memory finally is lost. At any rate they are not available.

VERN HUMPHRIES

having previously been sworn, resumed the stand and testified as follows:

Cross-Examination (Continued)

By Mr. Cottis:

Q. Mr. Humphries, would you step down. Could you sketch [179] for the jury the premises and show where the liquor store was and where your counter was originally and where it was moved to? Perhaps you could show Fourth Avenue down toward the bottom of the sketch and then show the premises in relation to Fourth Avenue, in that way perhaps it would be clearest to the jury.

The Court: Since all of the maps that we ever saw have the top of the map to the north and the bottom the south side, you will have the witness put it in.

Q. (By Mr. Cottis): Fourth Avenue then would be at the top?

The Court: Does Fourth Avenue run east and west?

Q. (By Mr. Cottis): Does Fourth Avenue run east and west?

The Court: Well, draw Fourth Avenue running east and west.

Q. (By Mr. Cottis): And then the premises in question—correct me if I am wrong—were on the

(Testimony of Vern Humphries.)

south side of Fourth Avenue, Mr. Humphries?

A. Yes. Do you want the premises before remodeling?

Q. First before and then afterwards would leave it the clearest.

The Court: One of the jurors thinks that it is on the wrong side of the street.

Q. (By Mr. Cottis): Will you explain where the building was with respect to Fourth Avenue, Mr. Humphries? [180]

A. This is Fourth Avenue running that way.

The Court: Draw two lines so as to indicate the street.

Q. (By Mr. Cottis): Mr. Humphries, feel free to use the entire piece of paper to show the premises so that it will be clear to the jury.

A. This is the entrance of the Panhandle before it was remodeled. This was a cab stand in the front end on the side of the bar. This is the bar here. This is the hallway leading down into the basement to the storeroom. This is the men's lavatory.

Mr. McCutcheon: People on the far end of the jury can't see you.

Q. (By Mr. Cottis): Mr. Humphries, couldn't you draw——

The Court: I think if you are going to make a new drawing you had better turn over the sheet or get a new sheet.

Q. (By Mr. Cottis): Now, Mr. Humphries, this is north up here, is that correct?

(Testimony of Vern Humphries.)

A. Yes. I am not very good at drawing but perhaps I can explain it. This is Fourth Avenue. This is the Panhandle at 315 Fourth Avenue. This was the entrance of the Panhandle. There was a little entrance for a little partitioned-off place which I think was a Federal Cab in there. This here is a bar of the Panhandle. This is the door here leading into a hallway to go down into the basement into the furnace room in the [181] storeroom of the restaurant. This is the men's lavatory. This is the back door here and right as you go out at the back door there was a stairway leading up to an annex upstairs one-room apartment. Over here on this side here, the front window. And here is where the restaurant sits. This is the counter right up to the front and then there was—it run down somewhere around 33 feet.

Then there was a room over on this side where the War Surplus Store, which is known as the Annex, I believe, and this door here entered into the Annex and there was a room partitioned off in there, which the Panhandle had leased someway or other or something there, and this is the Ladies' rest room here. Now, that is the nearest——

Q. Was there a cabinet back in this area somewhere, Vern?

A. In here there is a little partition and this was kind of partitioned off, just a little plyboard up here, and this is still the entrance that you can go into the stairways that you go down into the storeroom.

(Testimony of Vern Humphries.)

Q. Is there a storeroom in this corner somewhere or was there before the alterations?

A. Along the back wall there was a few little cupboards and right in here was a little long, narrow, slim room built there for an icebox to sit into, which there was a walk-in box set in there—a reach-in box I must say—and it was just about two feet space walking by you and there was a room in there for [182] a meat saw and to work your meat up in there and that was about all the room there was.

Q. Was there a meat saw in there?

A. Yes, there was a meat saw.

Q. And there was an ice-box in there—a walk-in?

A. Not a walk-in, a reach-in box.

Q. Did this little room extend west to the west wall of the building, was it about 14 feet long, in other words, wide?

A. Oh, I wouldn't say just how many feet it was. I remember they tore it down about the same days I bought in there and I was never in the Pan-handle before I bought in there.

Q. Those are the premises as they existed prior to what date?

A. They existed to the time that we signed the agreement on the 4th day of February. The remodeling started the 5th or the 6th.

Q. No remodeling was going on prior to the 4th?

A. No, there was not to my knowledge.

Q. Was there a card room through this door?

A. To my remembering there was some beer

(Testimony of Vern Humphries.)

stored in there and Mr. Larry Starns—the only time I was in there was one time, and right besides this door here he had a big large desk and then he had two or three trucks, as I remember, right here, because I helped later to set them outside.

Q. How many stools at this counter?

A. 16 stools at that counter—17 I must say. [183]

Q. Was there any around the end here?

A. No, sir, there were not.

Q. Did this taxicab area in the northeast corner have any entrances directly into the bar—into the Panhandle premises—or was the only entrance the one that you have shown?

A. The near as I can remember, it had an outside entrance. Now, come to think of it, I believe that this here—yes, it had a door here, I remember, because Mr. Blackard was quite often in there and there was a safe in there and there was no cab stand in there, if I remember right. Is that right, Joe?

Q. Now, were there poker tables in here, Vern?

A. No, there weren't.

Q. There were not?

A. There was not. Upstairs here, I think, if I remember right, there were three boys living up there and there was a card table sitting up there but to my knowledge it wasn't being used. They was using it and using it more or less for a dining room table or something.

Q. All right, now, that completes it as near as you can recall? I know it has been a long time.

(Testimony of Vern Humphries.)

A. That was about the way it was then.

Q. With 17 stools along here?

A. Something like that.

Q. Are you sure it was 17?

A. I know—no, wait a minute, it was room for 17. They [184] had them spaced two feet and five inches apart and we was adding making the 17 stools. That was the way, we had taken the stools up to move them.

Q. How many stools were actually there—16?

A. 16.

Q. Would you like to sketch in enough so that there are 16 shown here. And how long was this counter at that time?

A. That counter was 33 and one-half feet.

Q. Now, after the agreement was signed on February 4th, the idea was that this counter would be moved south in this direction and Starns' liquor store would go in in this area, is that correct?

A. That is right.

Q. And according to one version of the agreement the counter was to be moved approximately 18 feet south, is that correct?

A. That is right.

Q. And according to the other version of the contract the counter was just to be moved south, is that correct?

(No response.)

Q. In other words, according to Plaintiff's Exhibit 1, which is one of the agreements, the counter was to be moved south, according to Plaintiff's

(Testimony of Vern Humphries.)

Exhibits 2 and 3, it was to be moved approximately 18 feet south?

A. It wasn't the one that was existed. It was only supposed to be moved 18 feet. [185]

Q. I am sorry, I didn't understand you.

A. The first contract didn't have it all in and it didn't exist more than an hour or hour and one-half and the original one stipulated in it that it would be moved 18 feet to the south.

Q. In any event, that is one of the differences between Plaintiff's Exhibit 1, which is the signed contract, and Plaintiff's Exhibit 2, which is the signed contract with handwritten interlineation, and Plaintiff's Exhibit 3, which is the unsigned type-written copy of Exhibit 2, is that correct? That is one of the distinctions between those two versions of the contract?

(No response.)

Q. In one of them the distance approximately 18 feet was specified and in the other one it was not, is that correct?

A. That is correct, I believe. That is what the two papers read here, but the one—the one wasn't in existence long enough. I don't know how it ever got into our file or anything.

Q. Now, Mr. Humphries, you recall the eviction trial in Commissioner's Court about a year ago, didn't you?

A. I wasn't present very much; I don't know very much.

(Testimony of Vern Humphries.)

Q. You testified in it, did you not?

A. No, I didn't, I wasn't never called for that trial. I don't know what went on. I never fully went over the papers. I seen more of them yesterday than I have seen before.

Q. Now, do you know the distance from the north wall of the building to the south wall of the building? [186]

A. No, I couldn't, just more or less, I stated—you can take a figure 24 and one-half feet and 32 feet——

Q. Where do you get that figure of 24 and one-half feet?

A. That was the size of the liquor store.

Q. And then where did you get the 32 feet, is that the new counter size?

A. That is the new counter.

Q. And then the depth of the storeroom behind it?

A. Well, the rest of it, it had a door here and you couldn't have moved any further back on account of this door. I would say there was somewhere, maybe, roughly guessing, 12 feet.

Q. So that the record will be clear, Mr. Humphries, the building no longer exists, is that right?

A. That is right.

Q. It burned down last winter?

A. Yes, sir.

Q. Then, will you tell the jury what the overall plan was after February 4th when the agreement

(Testimony of Vern Humphries.)

was signed? Now, as I understand it, the counter was to be moved south?

A. Can I have another paper and I will draw it.

Q. I thought perhaps you could explain it first from here and then draw it. Would you rather draw it first? A. I would rather draw it.

Q. Mr. Humphries, so that the two sketches will be distinguishable will you mark something on here like the words [187] "after February 4th" or "No. 2" or something so that the jury will later know which is which.

Mr. McCutcheon: If the Court please, in File No. A-5003 there is contained two photographs of the premises which were introduced in a previous trial. I wonder if counsel wishes to use them. I will stipulate if he wishes to use them.

Mr. Cottis: I would like to use this method because it is a good method of showing before and after.

Mr. McCutcheon: I wonder if we might have our regular recess, Your Honor.

The Court: Court will stand in recess until 10 minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Do you want to explain it, Mr. Humphries?

A. Yes, sir, I will explain it. This is the new

(Testimony of Vern Humphries.)

Panhandle or the Panhandle after it was remodeled.

Q. This would be from about what date on?

A. Everything was completed just before March 6th or the morning of March 6th.

Mr. McCutcheon: Will you speak up.

The Witness: This was the way it was remodeled and the [188] way we opened on——

Q. (By Mr. Cottis): And you opened on March 6th?

A. Yes.

Q. All right.

A. This room here is Larry Starns' liquor store and this is the restaurant here where it was moved to. Here was chairs sitting around in the back here. This here is still that little storeroom I had for the reach-in ice box. These here are card tables here—three of them. The men and women's rest rooms is moved over to this side of the building. This here was the men's rest room and this the women's. The store room still remained the same as going through this room here and down into the basement.

This here was the bar which was made about 25 feet longer than the old one. It was 50 or 53 feet long.

Q. That is including the measurement around the curved end?

A. Around the curved end.

And this is the front entrance to both places, between the bar and between the stand. This stand here is a Columbia Air Cargo, which, I think, about

(Testimony of Vern Humphries.)

a week or something like that, I wouldn't say what date, this was added on the building and built in. So this is the Columbia Ar Lines. They are left somewhere around 3 feet passage in here between the bar and the Columbia Air Cargo office. [189]

These are slot machines, pin ball machines. Phonograph sits here and then these were machines that you drop a dime, nickel or quarter in, either one you wanted to, and hoped to get something out of. This was the counter.

This is the outside entrance or the alley entrance to the building right here and they had a stairway leading up here into this room here, which I don't know what was ever built up in there. There was some remodeling up in there but what I don't know because I never was up in there.

Q. That is about it as nearly as you can recall?

A. As near as I can recall. There was still remaining a door leading going into the Annex Building but the lease had expired from the owner of the Annex and they had taken this room away from them. But the key on this side—Mr. Blackard had locked that door then so they couldn't enter in and I don't know whether they had a lock on the other side or not but I do know the door was never torn out of the building.

Q. The door was what?

A. Never taken out.

Q. And, as far as you know it was always closed?

A. As far as I know it was afterwards.

(Testimony of Vern Humphries.)

Q. You never saw it open?

A. Before and while remodeling I seen it open and was in there once or twice.

Q. And as nearly as you can remember what was in there was [190] beer?

A. I know that there was a large amount of beer hauled out of there and whiskey.

Q. Was there anything else in there that you remember?

A. Yes, Mr. Starns' desk was, and he had taken it out and I helped take his big safe upstairs—up these stairs.

Q. Now, Mr. Humphries, on this area here which was, I think, occupied by Columbia Air Cargo, what sort of structure was that? Was it a partition to the ceiling or was it a railing or just what?

A. No, it was something on the order of a counter, I would say, somewhere around 36 inches high, maybe 40.

Q. It did not obstruct the view from the window, did it?

A. It came up to the window is all.

Q. To the bottom of the window frame?

A. That is right, because the window wasn't more than three and one-half feet—the window was up anyway three feet—two and one-half feet from the sidewalk.

Q. Mr. Humphries, you are certain that there were three card tables in the south area?

A. Yes, sir.

(Testimony of Vern Humphries.)

Q. At all times while you were in there?

A. Yes, sir.

Q. Would you describe the card tables?

A. Well, there was a round table excepting they had a "U" [191] sawed out of it, that was for a dealer to sit closer so that he could reach the center of the table.

Q. And each of the tables was fashioned in that manner?

A. They was more or less right in that order, yes.

Q. Now, Mr. Humphries, there is no doubt in your mind that there were three tables there, not two and not four?

A. There wasn't four and there wasn't two.

Q. Three? A. Yes, sir.

Q. And the three remained there?

A. While I was there.

Q. All the time that you were there, is that right? A. That is right.

Q. Now, how long was your counter after this remodeling?

A. Somewhere around 31 and one-half feet, somewhere like that, 32.

Q. Actually it was 32 feet, wasn't it?

A. Something like that, yes.

Q. It had been 33 and one-half feet, is that correct?

A. We sawed off about a foot and one-half of the counter in order for it to clear because they

(Testimony of Vern Humphries.)

still thought they were getting to get a lease up on this side room here and they had to take—I couldn't come and seal up that door, we could only come to the door.

Q. Mr. Humphries, isn't it true that your counter extended [192] a little bit up around the edge of Larry's Liquor Store here?

A. It was impossible for it to—it was built up flush here and a gradual slope, I would say, about a foot in as you went to the back. It didn't come straight out flush here, it came in a little.

Q. What is this line that runs across the south-east corner of Larry's Liquor Store?

A. That was a plan mapped out on the floor and part of the construction of February 4 when we was entering the contract and they went over the plans of how they were building it in order for me to have a good view and so forth, why, Larry's store was to taper off from here in to give a view clear to this window where this window had a clear view of the restaurant sitting here. And then a few days later Mr. Starns said it wasn't enough room of 18 feet so that when we had the discussion of that and then he decided that he couldn't stand to lose this space in here so he built it square.

Q. Now, as the premises were finally remodeled in this manner you still had 16 stools at your counter?

A. Yes, by shortening them up.

Q. That is by shortening the intervals between stools?

A. That is right.

(Testimony of Vern Humphries.)

Q. In other words you now get 16 stools in a 32-foot space where formerly there had been 16 stools in a 33 and one-half foot space, is that right?

A. Yes, upon the designs here we drew then my counter if this here hadn't have been in here and had been off here, only come back here 18 and one-half feet, then my counter would have come like this with four stools here and with coupling them up as we had planned and kept the other foot and one-half on the corner here we would have had the fifth stool—I would have had five more stools at the counter.

Q. Because of the circumference of that curve?

A. Yes, the curve was to be on the same order to match this bar here.

Q. That would have been true if this distance from the north wall to the south wall of Larry's Liquor Store had been 19 and one-half feet?

A. That is right.

Q. Actually what was that distance?

A. 24 and one-half feet.

Q. And then your counter was 32, that total is 56 and one-half feet, is that correct?

A. Something like that.

Q. And then how much space was left back here where the three card tables were?

A. There was, I would say, 12 feet. It could be 15 feet, I never did measure it to be exact.

Q. At the south end of your counter was the door into the building that was known as the Annex? Is that correct? [194]

(Testimony of Vern Humphries.)

A. Yes, the door was—we had to take—it was right up against this here, right in here was the door to the Annex. It came right even, just could get hold of the handle of the door to open it.

Q. The door opened into the Panhandle premises, did it?

A. That is one question I could not—I don't recall whether it did or whether it didn't, but I couldn't swear to it.

Q. Where were the various areas on this remodeled building that you stored your inventories?

A. I stored my inventories—the old one had a partition back in here where some canned goods were kept.

Q. That is on the south central portion of the premises?

A. Well, it was straight across the back.

Q. All the way across the south end?

A. There were cupboards in there and there was also a basement with a room in it. I wouldn't say how big that room were, I would say 6 by 6 or it could be a little bit larger or something, I never did step it off and I used the storeroom downstairs by the furnace.

Q. That downstairs storeroom that was by the furnace was in the southeast corner of the premises?

A. You went down the stairs here and it wasn't a full basement, it was a basement with two partitions in it.

Q. And there was another entrance to that that was known as the coal chute? [195]

(Testimony of Vern Humphries.)

A. No, it had been at one time a coal bin, I think, because it had a little sloping two-foot hole for coal to slide down in there, evidently that was what it was for.

Q. Could you get in and out of it through that means?

A. In and out through the coal chute?

Q. Yes.

A. You would almost have to be a monkey.

Q. You never did that?

A. You would have to get down and dive down in it.

Q. And you never did go in and out of it by that method?

A. No, when you get to be 40 you——

Q. So, you never did actually?

A. No, I never did.

Q. Was anything stored in that basement store-room besides inventory of yours?

A. No. In this little room up in here I think there were four or five cases of whiskey kept and I do believe there was quite often a few cases of beer kept in there but most of the time it was brought in in the morning by Anchorage Cold Storage or one of them on a truck to be delivered and I know Joe brought in his whiskey from the liquor store but he still brought it in by the case lot. I know there were a few cases of whiskey set in there but how much I never did count it or anything of the kind.

(Testimony of Vern Humphries.)

Q. How do you know that there was any down there? [196]

A. I don't know—there was never down into the basement itself, it was inside the little partition here.

Q. And the partitioned room was not in the basement?

A. To go to the stairways right here was a little fenced-off room. I would say it was about a four by five, something like that, on the side of the lavatories, and you went through a door here into this little room and then opened up the door that laid flat on the floor. You opened it up and then went down into the basement.

Q. And it was in that little room that preceded the entrance to the basement that the liquor was?

A. There was a few cases of whiskey in there, yes.

Q. Now, what door was it that you say Joe locked?

A. That was the doors that Joe locked.

Q. That is the door into the entrance way to the basement?

A. We always had it locked. We always had a lock on there and we both had keys but Mr. Blackard taken and got another lock and put on there so that my key was no longer any good.

Q. And what date was that that you testified?

A. That was, I would say that was somewhere around the 15th of April.

(Testimony of Vern Humphries.)

Q. It was before that notice was served on you terminating the contract?

A. It was the same day.

Q. The same day? [197] A. Yes.

Q. Were those card tables the usual kind of green felt covered tables? A. Yes.

Q. What would you estimate the diameter of each of them to be?

A. Oh, gosh, that I wouldn't say, there was room enough for seven chairs—seven chairs equal to these kind of a chair here that would go around the table. I never did measure one of them.

Q. Did you ever use those tables for serving food on?

A. The first two—the first Sunday the Columbia Air Cargo had a special 'plane in and I asked permission from Mr. Blackard to set them at the table. There was six or seven women and six or seven men and I sat two tables of them for them to eat at and the following Sunday I sat up for my wife and three babies and Mr. Blackard said, "We might get grease on there and get the cards greasy and they couldn't sit there" so my family went home to eat.

Q. And where are the men's and ladies' rooms on this remodeled plan?

A. Right here. They are right here in the back.

Q. And then north of the ladies' room was it that storeroom area?

A. Well, yes, it would be right besides the men's

(Testimony of Vern Humphries.)

room. It [198] would be toward the north.

Q. Can you estimate the dimensions of the men's room?

A. We had to build—it was a very, very narrow—I would say it was just about the width of one of these tables here and we had to build half of the men's washroom inside of this room here so that there would be room enough for a man to go into the rest room.

Q. And south of the men's room was there a storeroom? A. South of the men's room?

Q. Uh huh.

A. No, there was a ladies' lavatory there.

Q. Wasn't the ladies' lavatory north of the men's room? A. Pardon?

Q. Wasn't the ladies' lavatory north of the men's room?

A. No, they were both side by side—I could be a little bit mistaken, this could have been the women's and this the men's—no, it couldn't either because the men's room had the sink built half into the storeroom.

Q. Now, then, this was the ladies' room?

A. Yes.

Q. And south of the ladies' room what is this area?

A. That area is a stairs leading upstairs to the Annex and clear outside of it there was a little door in there. I never was in there but I do know there was some beer and whiskey kept in there or

(Testimony of Vern Humphries.)

I was informed he kept some in there. [199]

Q. Would you mark the men's room in and the ladies' room in?

A. They are. This little room out here was a little veneer board put up there to kind of shield the doors when they opened so that the public could not see if there was a lady in the lavatory or something of that sort and that is the reason that was built out here.

Q. Now, what do you estimate the dimensions of this room which is situated in the southwest corner of the building to be?

A. Oh, I would say it would be somewhere around six feet.

Q. Six feet? A. Uh, huh.

Q. And how long?

A. Roughly guessing, never measuring it, I would say somewhere between 12 or 18 feet, I would say 18 feet would come closer to it.

Q. 18 feet in length? A. Yes.

Q. Was it changed at all from the dimensions that it had previous to the remodeling?

A. It had remained the same size.

Q. The size of it had not changed?

A. No.

Q. And you would now estimate that it was about six feet wide and eighteen feet long? [200]

A. Something like that, yes, sir.

Q. Now, as you walked about this little six by 18 foot room, Vern, after you were installed there and were operating the restaurant, what was on

(Testimony of Vern Humphries.)

your left as you walked in from this door?

A. There was a shelf there. On the left? There was a little narrow board put up there for a shelf.

Q. About how wide was the shelving?

A. Oh, I would say about two feet—foot and one-half, something like that.

Q. And on the right what was there?

A. There was on the right—there was an icebox—a reach-in box.

Q. And about how deep was that?

A. I would say it was somewhere in the neighborhood of four feet.

Q. And then how much room was there in between the shelves and the icebox?

A. There was just walking space. You just barely could open the doors up. But you couldn't open the doors up and walk through because there wasn't no room for it.

Q. Then south of the reach-in icebox—is that what you called it?

A. Uh, huh.

Q. South of the reach-in icebox and south of the shelves you [201] had a meat saw and grinder and cube machine, is that right?

A. And a slicing machine.

Q. And a slicing machine?

A. There was a little room that looked something like one of these old fashioned outhouses that was pushed up in there. It had a little door to go in there, just about a two by two, that we lined with stainless steel and we made a stainless steel work room out of there with a cement floor.

(Testimony of Vern Humphries.)

Q. Where was that?

A. It was right back of this little room, because you still had to go through another door because there had been another little part tacked onto there.

Q. Was there an entrance way to the basement there inside the storeroom?

A. No, sir, that coal chute is nailed up. They remodeled that door that went in there and made a longer door and made it about flush liking about six inches flush to the floor. You usually had to step up two and one-half feet to go into a little door to go into this room, so they cut it down and made a bigger, an easier entrance there to it.

Q. That was all nailed up, boarded up, whatever you want to call it, all the time that you were in there, is that correct?

A. They put new boards over that, yes.

Q. That is before March 6th?

A. Before March the 6th. [202]

Q. The meat saw, the grinder, the cube machine and the slicer, those are items that you testified yesterday you obtained in Seattle?

A. Some of it I obtained, one piece or two pieces I got in Seattle.

Q. Which ones?

A. I got the cube machine in Seattle.

Q. And how much was it that you paid for the cube machine? A. \$318.

Q. Did you get any of those other items in Seattle?

(Testimony of Vern Humphries.)

A. Yes, I got a slicing machine in Seattle.

Q. How much did you pay for that?

A. I paid \$575 for that.

Q. \$575? A. Yes, sir.

Q. Did you get either the meat saw or the grinder in Seattle?

A. No, I didn't. I didn't buy no grinder at all.

Q. Was there a grinder back there?

A. Yes, there was.

Q. Hadn't you bought that from Graves?

A. Yes, sir, I did.

Q. Was there a meat saw back there?

A. There was a real old meat saw back there, yes.

Q. Hadn't you bought that from Graves?

A. No, I evidently didn't, Mr. Blackard claimed that. [203]

Q. Was there anything else back there in that middle working area of yours?

A. No, there weren't.

Q. Now, altogether you had three iceboxes or refrigerators, didn't you? A. Yes, I did.

Q. Where were the other two?

A. Where was the other two? One was up by the stove sitting up in here.

Q. And where was the other one?

A. I let the other one to the Sunshine Market. I didn't have space—no space to set it—so I let it have it. Mr. Phillips picked it up and I don't know whatever became of it. They picked it up after I went outside last spring.

(Testimony of Vern Humphries.)

Q. What kind was that?

A. I can't just right off-hand recall.

Q. Was it a Kelvinator?

A. It was an electric icebox but I really couldn't recall the name of it.

Q. Do you recall where you obtained it?

A. Yes.

Q. Where?

A. Out here on Fifth Avenue at the War Surplus Store.

Q. And do you remember what you paid for it?

A. Yes, sir, I remember what I paid for it. [204]

Q. What was that? A. \$300.

Q. But you can't remember what kind it was?

A. I think it was a G.W. or G.—something on the icebox.

Q. How big was it?

A. Oh, I would say it was a 7-cubic feet—7 or 8 cubic feet.

Q. Now where did you obtain the one that was back by the store back in this area back of the counter?

A. I bought that from Mr. Graves.

Q. And how much did you pay for that?

A. Well, I bought the whole thing for \$2500.

Q. Where was the icebox that you sent to the Sunshine Market before it went to the Sunshine Market?

A. Where was it? I just had brought it down to the Panhandle. I was going to use it for a meat—a fish icebox.

(Testimony of Vern Humphries.)

Q. Where did you have it at the Panhandle?

A. I had it sitting directly in the back over toward the door here.

Q. And when did you send it over to Sunshine market?

A. I sent it over after the remodeling, after I lost my space.

Q. So when you were operating between March 6th and whenever it was in May that you closed up—May 21st, was it? A. Yes. [205]

Q. During that period March 26th to May 1st you had that reach-in icebox or refrigerator?

A. Yes.

Q. And then the 7 or 8 cubic foot one that you had bought from War Surplus?

A. No, the one that I bought on the inventory from Mr. Graves.

Q. How big was that one?

A. Oh, that was, I wouldn't—it is pretty hard to estimate. It was a very large one. It had three big doors the same as a big reach-in box. I would say that at least five feet and one-half high or six feet. I would say it was four feet wide and pretty close to 8-feet long. Now, I never measured it. That is as near——

Q. Was it larger or smaller than the one that was back in this little room at the southwest corner?

A. It was the one back in here, was a wooden one but it was more or less on the same size.

(Testimony of Vern Humphries.)

Q. Did you have any other refrigerators or ice-boxes there? A. No, sir.

Q. Do you recall when you bought that 7 or 8 cubic foot one that you lent to Sunshine Market?

A. Yes, sir.

Q. When?

A. I bought it just about the first of September, 1947.

Q. And you brought it to the Panhandle about February 4th [206] or thereabouts.

A. Somewhere in there, just about, I would say, February 6th or 8th, somewhere along in there.

Mr. Cottis: All right, you can go back on the witness chair, if you want, at this time.

Q. Now, Mr. Humphries, what happened to the bills for most of these things, were they destroyed when your house caught fire? A. Yes.

Q. Had you paid for most of these things by check?

A. Yes, most of them was paid by check. I think there was the purchase in Seattle—when I was down to Seattle I had Travelers Checks.

Q. When were you in Seattle?

A. I was in Seattle in July.

Q. Of 1947? A. In 1947.

Q. What did you make the purchases in Seattle at that time for?

A. I was—I thought I had a lease up on the McVickers Building on 4th Avenue and I was going to put in a cafeteria.

(Testimony of Vern Humphries.)

Q. And it turned out you did not have a lease?

A. It turned out when I came back that the rent was raised so I decided not to.

Q. Where did you keep this equipment that you had bought for that purpose between that time and February 4th? [207]

A. I had some at the Alaska Railroad and I had some at my home.

Q. Now, excepting for the purchases which you had made at Seattle and which you state were by travelers check, did you make any other equipment purchases other than by check?

A. I may have.

Q. All right, can you tell me what ones they were?

A. I don't know whether I paid them by check or whether I paid them by all travelers checks. I paid some by cash, I am pretty sure. I think I bought the cube machine—I think I paid for it in cash money.

Q. And where was it that you had acquired the cube machine?

A. At Green-Winter in Seattle.

Q. Now, the slicing machine, where was it that you had bought that?

A. I believe I bought it there at Doreman's Hotel Supply.

Q. Now, do you think you paid for that in cash or by travelers check?

A. I think I paid by travelers check.

(Testimony of Vern Humphries.)

Q. But cash to Green-Winter, you think?

A. Yes.

Q. Where had you purchased the travelers checks?

A. At the First National Bank here in Anchorage.

Q. Now, the icebox that you had purchased at the Surplus Store, you paid for that with a bank check, did you? [208]

A. I don't recall whether it was with a check or whether I paid in cash. I was at the Alaska Railroad at the time and generally carried quite a large amount in my billfold and I wrote a lot of checks. I paid both ways.

Q. That was on September 1st, 1947?

A. Somewhere in there, yes, I wouldn't say exactly the date but it was somewhere right in there.

Q. That is within one week one way or the other?

A. Something of that sort.

Q. And you were at the Alaska Railroad at that time?

A. Yes, sir.

Q. Running the messhall down there?

A. Running the messhall.

Q. Now what did you buy that icebox for—use at the railroad?

A. No, I was planning at that time to operate a cafeteria up on Fourth Avenue.

Q. That is the McVickers Cafeteria in the new McVickers Building?

A. Yes.

(Testimony of Vern Humphries.)

Q. When was it that that fell through?

A. That fell through in the latter part of October, 1947.

Q. Now, you stated, I believe, that Glen Phillips removed that icebox from the Sunshine Market?

A. Yes. [209]

Q. How do you know that?

A. When I returned here in January of 1949 I went up there and asked for the icebox and he says "Well, this place has went through bankruptcy or something; it has just changed hands and that a man by the name of Phillips—Glen Phillips of the Panhandle came and claimed the icebox."

Q. Who was that that you were talking with, do you know?

A. It was the manager that runs the Sunshine Market.

Q. Do you recall his name?

A. No, I don't, don't know that I ever knew his name.

Q. But this was in January of 1949?

A. Yes.

Q. Do you have any other reason for thinking that Phillips took it? A. No.

Q. Your only knowledge of the matter is what this man told you, is that correct?

A. Right.

Mr. Cottis: May it please the Court, I ask that the jury be instructed to ignore that testimony.

The Court: Motion is denied.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Now, the three doors and the large refrigerator that was behind the counter and the reach-in refrigerator were part of your purchase from Graves, is that correct? [210]

A. That is correct.

Q. And you paid Graves altogether \$2500?

A. That is correct.

Q. Was that payment to Graves made in cash?

A. Yes, it were.

Q. And any receipt for it would have been lost in the fire so far as you know?

A. So far as I know, yes.

Q. Now, Mr. Humphries, yesterday you introduced a statement from your accountant showing how much would have been due Blackard at 6% for a given period of time, do you recall that?

The Court: I beg your pardon, counselor, the statement did not go in evidence.

Mr. Cottis: I am sorry, I thought that it did.

The Court: I think it did not; that is my recollection of it.

Mr. Cottis: I think your Honor is correct.

The Court: We will ask the Clerk to be sure.

Mr. McCutcheon: Mr. Cottis objected and the Court sustained the objection and Mr. Cottis is using this to refresh his recollection.

The Court: It is not in evidence though.

Q. (By Mr. Cottis): Mr. Humphries, yesterday you testified that the amount due Blackard for the month of March was \$203.45? [211] A. Yes.

(Testimony of Vern Humphries.)

Q. I don't recall your stating yesterday whether you ever paid that amount to Mr. Blackard, did you?

A. No. Mr. Blackard owed me some money and I gave him the statement to be deducted from the amount he owed me for papering and painting the building.

Q. Now, you borrowed some money from Blackard in February, is that right?

A. That is right—\$450.

Q. And did you repay that by check?

A. I repaid that. No, by cash and the note—I borrowed the money from Mr. Campbell. Mr. Campbell went up and borrowed the money from the Bank of Alaska on a note and came back and handed it to me and I paid Mr. Blackard.

Q. In cash? A. In cash.

Q. Did he give you a receipt or anything?

A. He said he would. We were getting ready to open up and he came to me about twelve o'clock and he says "Vern, I don't have money to open on" and I said "I have got to go to the bank anyway" and I asked Marvin to run up there and get the money, and I give Joe \$450 and I had \$50 left of the \$500 to open the restaurant on right at that time.

Q. Did he give you a receipt?

A. He said later on he would. [212]

Q. Did he ever give you one?

A. He denied it when, of course, there hadn't been a word said about it.

(Testimony of Vern Humphries.)

Q. And then he denied ever receiving it?

A. He said "Try and prove it."

Q. And when you gave Graves \$2500 for that equipment did you get a receipt from Graves?

A. I got a bill of sale. I wouldn't know whether there was a separate slip made out for the money or not but he gave me a bill of sale swearing that the purchase was mine.

Q. That bill of sale was the one that has been marked Plaintiff's Exhibit 4, this document here, is that correct? A. Yes, it is.

Q. And that same bill of sale, Plaintiff's Exhibit 4, is the one where the second page has been changed, is that correct?

A. Well, there have been more items wrote on there.

Q. More items appear on this middle page than were purchased by you from Graves, is that right?

A. That is right.

Q. And will you tell me again how that happened?

A. I borrowed \$1500 from the Bank of Alaska and they came down and looked over the equipment that I had and then we went back to the Bank and we used this here for the inventory for the mortgage.

Q. Did you inform the Bank of Alaska that some of these items [213] had not been purchased from Graves?

A. It wasn't on there at the time. I brought the man from the bank down and showed him what else I had put into the building

(Testimony of Vern Humphries.)

Q. And he asked you whether you had any bill of sale on the items?

A. Yes, asked if they were free and clear.

Q. So then you added the items here that were not included in the purchase from Graves, is that right?

A. Yes, sir.

Q. And then showed them this bill of sale?

A. Used that bill of sale.

Q. About what date was that that you borrowed the \$1500?

A. Oh, I would say it was the latter part of March. I can't recall the exact date of it right now, I don't, but I am quite sure that *it the* latter part of March.

Q. And it was at that time that those items were added to this bill of sale which is dated February 5th?

A. Yes, February—yes.

Q. Altogether now, you paid Clyde Graves \$2500, is that right?

A. Yes, sir.

Q. And you have no receipt but instead you used this bill of sale for the purpose of a receipt, is that right?

A. When the money—I couldn't get down right at the time. [214] My daughter was very sick and we had the doctor there. I sent Kenneth Havins down with the money and to borrow \$450 from Mr. Blackard. Mr. Blackard made out a little writing on a piece of paper that we owed him \$450 and Kenneth Havins and Joe Blackard give Mr. Clyde Graves the \$2500 and at twelve o'clock I came down

(Testimony of Vern Humphries.)

and went over with Mr. Graves and he signed the bill of sale to me.

Q. At McCutcheon's office? A. Yes, sir.

Q. Then, do I understand that you gave Mr. Havins \$2,050 and that Joe made up the difference of \$450 in that purchase price?

A. That is right. Mr. Havins had \$500 of his own money and we got \$450 from Mr. Blackard and I put in the rest.

Q. But that was not the \$1500 that you had borrowed from the Bank of Alaska, was it?

A. No.

Q. Where had you had that \$1500?

A. I hadn't borrowed that \$1500.

Q. Well, now, straighten me up on my arithmetic, if I am wrong, on the purchase from Graves, Havins put in \$500, right? A. Right.

Q. Blackard put in \$450? A. Right.

Q. Total purchase price was \$2500, right? [215]

A. Right.

Q. That leaves a deficiency of \$1550, correct?

A. That is right.

Q. You gave that \$1550 to Havins, is that right?

A. That is right.

Q. And it was in cash, right?

A. It was in cash.

Q. Now, where had you been holding that \$1550?

A. I had some of it in my personal possession.

Q. And where was the rest of it?

A. I borrowed \$500 right at the time from the

(Testimony of Vern Humphries.)

Sunshine Market and I had the rest in The First National Bank and I went up to The First National Bank on the Fourth day of February about ten o'clock and drew out all of the money that I had in there.

Q. And how much was that?

A. Oh, that was between four and five-hundred dollars, I wouldn't say how much it were but it was somewhere in there.

Q. Then you borrowed \$500 additional from Sunshine Market?

A. Yes, I did, and gave them back—and I paid the Sunshine Market back a few days later because from Hoyt Motors I borrowed a thousand dollars and I paid the Sunshine Market back.

Q. You had between four hundred and five hundred in the First National Bank in a checking account or a savings account?

A. In a checking account.

Q. And you went down and drew that out? [216]

A. That is right.

Q. Why didn't you write a check for it?

A. Well, there was a check I wrote for it in order to draw the money out.

Q. But you didn't draw the check to Graves or to Havins, did you?

A. No, I drew it to myself.

Q. And cashed it? A. And cashed it.

Q. And then you paid the cash over to Havins?

A. That is right.

(Testimony of Vern Humphries.)

Q. That was between four and five hundred dollars?

A. That is right, plus the rest of the money.

Q. Now, when you borrowed the \$500 from Sunshine Market was that in cash?

A. No, that was by check.

Q. That was a check?

A. That was a Certified Check made on The First National Bank.

Q. And drawn by Sunshine Market to your order?

A. It was made out in my name.

Q. And that was \$500?

A. That was \$500.

Q. Now that makes a total of between \$900 and a thousand dollars that we have accounted for, right? [217]

A. That is right.

Q. Now the balance of the \$1550 that you had to produce, where did you get that?

A. I beg your pardon?

Q. When we started on this arithmetic you had \$1550 that you had to make up to bring the total purchase price to Graves up to \$2500?

A. Yes.

Q. Now we have accounted for between 900 and a thousand dollars of that \$1550?

A. Yes.

Q. Where did you get the rest of it?

A. I and my wife had that much in cash at home.

Q. And you had that in cash at home?

A. Yes, month before that I had gotten quite a large check from the Alaska Railroad.

Q. But you had not deposited it in your account?

(Testimony of Vern Humphries.)

A. Not all of it. I deposited some of it but I had not deposited all of it.

Q. Was it one check from the Alaska Railroad?

A. It was one check.

Q. And you deposited a portion of it in The First National Bank?

A. Yes, somewhere around twelve or thirteen hundred dollars.

Q. And took the rest in cash? [218]

A. And take about seven or eight hundred dollars in cash.

Q. What did you tell me about Hoyt Motors?

A. Hoyt Motors. I borrowed a thousand dollars on my car later on and paid the Sunshine Market back their \$500.

Q. Did you have a bank account in the Bank of Alaska at that time?

A. Right at that time, no.

Q. After you closed your account out at The First National Bank did you open one at the Bank of Alaska? A. Yes, I did.

Q. Was that a checking account or savings account? A. Checking account.

Q. So at all times you had a checking account, is that right?

A. Well, there was a lapse that my banking account wasn't entirely closed out at The First National Bank, never, not for the past several years.

Q. So you have always had at least one checking account and occasionally two, is that correct?

(Testimony of Vern Humphries.)

A. Not occasionally two, it was closer to go to the Bank of Alaska when I was in the Panhandle so I up and opened a banking account there and I didn't do no more depositing with The First National Bank.

Q. But you kept the account open?

A. I think somewhere around 40 or 50-cents left in there.

Q. All during that time that we are discussing here you have [219] had at least one checking account, is that correct? A. Yes.

Q. Did you ever at any time give Clyde Graves any checks? A. Not myself, no.

Q. Did you ever draw any checks payable to the order of Clyde Graves?

A. Not to my remembrance.

Q. Why, with a checking account at your disposal, were all these matters handled in cash?

A. Just happened to be one of those things, I guess, as near as I could answer, not for or any reason to do it.

The Court: I think we may as well suspend.

Mr. Cottis: Very well.

The Court: You may step down.

The trial will be continued until two o'clock. Ladies and Gentlemen of the Jury, you will remember that you must not discuss the case among yourselves or with others or listen to any conversation about it or form or express an opinion until it is finally submitted to you. Report back at two o'clock.

(Testimony of Vern Humphries.)

Court now stands in recess until 2:00.

(Whereupon, at 12 o'clock, noon, Thursday, June 23, 1949, the court recessed until 2 o'clock the same day.)

Afternoon Session

The Court: Clerk may call the roll of the jury.

(Names of jurors were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Counsel may proceed with the examination of the witness.

VERN HUMPHRIES

having been called as a witness, having been previously sworn, resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Cottis:

Q. Mr. Humphries, as I understood your testimony this morning, Clyde Graves was paid in cash, is that correct?

A. Nearest to my knowledge, yes.

Q. And the total purchase price was \$2500?

A. Yes.

Q. And it was all paid to him?

A. Yes, sir.

Q. You are sure in your recollection of that, if anything, it couldn't have been \$2400?

(Testimony of Vern Humphries.)

A. It is \$2500.

Q. Now, can you recall about what date you paid Mr. Blackard back the \$450?

A. It is on the 6th day of March, about twelve o'clock.

Q. Was the bar open at that time? [221]

A. We was getting ready to open up. We was supposed to open at twelve but we didn't open until two.

Q. When you say that "We were getting ready to open up" do you mean both the restaurant and the Panhandle Bar?

A. And the liquor store.

Q. And the liquor store. They all opened on March 6th, then?

A. That is right.

Q. At about two o'clock in the afternoon?

A. Yes.

Q. And it was about noon that day you repaid Mr. Blackard the \$450?

A. Yes.

Q. And that was in cash?

A. Yes, sir.

Q. Now, had you borrowed that money from Mr. Campbell?

A. I borrowed \$300 of it.

Q. And you had the other \$150?

A. No, sir.

Q. Where did you obtain the other \$150?

A. From Delmar Ingram.

Q. I thought you said this morning that the \$500 was borrowed from a bank by Mr. Campbell to pay off that \$450?

Mr. McCutcheon: Just a moment, is counsel tes-

(Testimony of Vern Humphries.)

tifying or are you asking a question? Counsel said "I thought you said this morning * * *."

The Court: Counsel may ask the question whether he did. [222] Objection is sustained. Counsel is making a statement.

Q. (By Mr. Cottis): Am I mistaken in my belief that you testified this morning that the \$500 was borrowed from a bank to pay back that \$450?

Mr. McCutcheon: Just a moment, I object again—an improper question.

The Court: Overruled.

The Witness: I borrowed \$300 from Mr. Campbell and his nephew—his cousin Delmar Ingram \$250.

Q. (By Mr. Cottis): You borrowed it from Delmar, did you?

A. From Mr. Campbell and Delmar.

Q. You borrowed \$300 from Mr. Campbell alone, is that right?

A. I borrowed \$300 from Mr. Campbell. I borrowed \$250 from Delmar Ingram.

Q. Did all that take place on March 6th?

A. Nearest to my recollection, yes.

Q. So altogether you borrowed \$1550, is that right? A. Yes.

Q. And of that you paid \$450 back to Joe Blackard? A. Yes.

Q. Did you not testify this morning that Mr. Campbell borrowed \$500 from a bank and that from that \$500 Blackard was paid back?

(Testimony of Vern Humphries.)

A. I may have left out Del Ingram. I knew that Mr. Campbell gave a personal note for the \$300 at the Bank of Alaska and that [223] Del Ingram drew out of his savings at The First National Bank \$250.

Q. Now, you didn't get any receipt from Blackard, did you? A. No, I didn't.

Q. Mr. Humphries, did you not testify that some sort of promissory note had been delivered by you to Blackard at the time that you originally borrowed the money in February?

A. Not to my knowledge right now.

Q. You don't recall any document changing hands when you borrowed the money?

A. There was something; there was an I.O.U. for \$450, something like that was made.

Q. And signed by you? A. Yes.

Q. Was that returned to you by Blackard when you repaid him this \$450 on March 6th?

A. No.

Q. Did you ask him for it?

A. Later on I did, yes.

Q. Was it ever returned to you?

A. No, it weren't.

Q. I show you a document dated February 5, 1948, purportedly signed by Joe Blackard and Kenneth Havins and Vernon Humphries, witnessed by C. L. Graves and someone else whose name I can't read and ask you whether that is the document you are referring [224] to?

(Testimony of Vern Humphries.)

A. I am sorry, I don't recall this.

Q. That is not the document that you are referring to that changed hands?

A. Not to my recollection, no.

Q. Is that your signature?

A. I can't believe that it is.

Q. How was it that you hurt your finger, Mr. Humphries?

A. I was jacking up my car and I was jacking it up with a bumper jack. The car slipped ahead and my finger was caught between a jack and the trunk-handle in the car and squeezed my finger off.

Mr. Cottis: If Harold Brand is in the Court room I ask that he exclude himself and stay excluded.

The Court: All persons who are witnesses in this case are asked to remain outside the Court room until they are individually called as witnesses.

Q. (By Mr. Cottis): Was Harold Brand with you at that time? A. Yes, he were.

Q. And was that somewhere near Wasilla?

A. No, I don't think it was near—it was the other side of Palmer.

Q. The other side of Palmer?

A. Yes. [225]

Q. When did that happen?

A. That happened as near as I can remember—I can get the exact date from the doctor—but I believe about the 1st day of April.

(Testimony of Vern Humphries.)

Q. You stopped in Palmer and went to the doctor on the way home, did you not?

A. I did, yes.

Q. And you did not bring with you the moose that you and Brand had just shot, did you?

A. That i——

Mr. McCutcheon: Just a moment, that is an improper question, your Honor, incompetent, irrelevant and immaterial.

The Court: I think there was some testimony about moose meat on direct examination.

Mr. McCutcheon: Read the question back.

(Question read.)

Mr. McCutcheon: That is an unfair question, your Honor, there has not been anything in the world to show he had shot a moose and there hasn't been any testimony on his part to show that he has been guilty of anything. He has denied that and we intend to show differently later in this trial. That is a completely unfair question.

The Court: I think since the subject was opened up that counsel for the defendants has a right to inquire into it.

Mr. McCutcheon: Very well. [226]

The Witness: I was out fishing that night—going fishing.

The Court: Answer the question.

The Witness: I didn't shoot no moose meat, no moose.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Where were you going to fish?
A. Up at some lake.

Q. And this was about what date?

A. It was about April 1st, somewhere along in there, maybe a little bit before.

Q. Do you recall the name of the lake?

A. No, I don't off-hand.

Q. You had fishing equipment with you, did you?
A. Yes, I did.

Q. Did you also have guns in the car?

A. Yes, I did.

Q. And Brand had one, too, did he not?

A. No, he didn't.

Q. Just your gun was in the car?

A. I always carry fishing gear and I had a gun with me, yes.

Q. You had a rifle in the car, did you not?

A. I had a shot gun with me.

Q. What doctor did you visit in Palmer on the way back?

A. It was some Army doctor. I do believe—I wouldn't say—I think his name was Long—L-o-n-g. [227]

Q. L-o-n-g?

A. I wouldn't swear to that either. I was there.

Q. What doctor did you visit when you came back to Anchorage?
A. Dr. O'Malley.

Q. Now, did blood poisoning set in from that incident?

A. Blood poisoning set in in about two weeks—7 to 10 days afterwards.

(Testimony of Vern Humphries.)

Q. And who was it that advised you you should go outside for treatment?

A. There is nobody excepting my wife is a graduate university physiotherapist and bone specialist herself and we agreed up on it ourselves to go outside because my finger was not healing correctly here.

Q. Did you return to Dr. O'Malley when you had decided that blood poisoning had set in?

A. Yes, I did.

Q. And did Dr. O'Malley concur with you that it was blood poisoning?

Mr. McCutcheon: Just a minute, object to it on the grounds it is immaterial, incompetent and irrelevant.

Mr. Cottis: Witness brought up the question yesterday of his finger, Your Honor, and I am trying to——

The Court: It was testified to on direct examination and therefore it may be inquired into by cross-examination and your objection is overruled. [228]

Mr. McCutcheon: Yes, sir.

The Court: Exception is noted.

The Witness: Dr. O'Malley had taken the bandage off of my hand and it was all infected and so forth and ordered me to bed for three or four days and to soak it in salt water.

Q. (By Mr. Cottis): And Doctor O'Malley did not say anything about going outside for treatment?

(Testimony of Vern Humphries.)

A. Very seldom that a doctor will do that, but I made up my own mind that my finger wasn't healing right and my wife——

Q. Dr. O'Malley did not tell you? Answer the question, please?

A. Not to my recollection. He knew I was going outside, though.

Q. Now, why were you going outside?

A. Why I was going outside? Upon the advice of Dr. O'Malley, he advised my taking my oldest daughter outside.

Q. How long prior to this finger crushing had that advice been given her?

A. Regarding what?

Q. To take your oldest daughter outside?

A. Oh, that had been advised to me for, oh, at least four or five months.

Q. Now, yesterday you testified that you took Marvin Campbell here into partnership because you had to go outside to see an outside physician about your blood poisoning, is that correct? [229]

Mr. McCutcheon: Objected to, Your Honor, he made a statement and didn't put it——

The Court: Objection is sustained.

Q. (By Mr. Cottis): Am I correct in recalling——

The Court: Don't state it that way. Ask him if he so testified. What counsel's recollection is is of no consequence to the jury.

Q. (By Mr. Cottis): Did you testify that you recall that you took Marvin Campbell into partner-

(Testimony of Vern Humphries.)

ship because you had to go outside to seek medical aid for your blood poisoned finger?

A. For my finger, yes, and my daughter.

Q. Did you testify yesterday that your daughter had to have medical treatment outside?

A. I didn't testify, no.

Q. But it is a fact that she did have to have medical treatment outside, isn't it? A. Yes.

Q. And you had known that for how long before April? A. Several months.

Q. Did Dr. O'Malley advise you that you had blood poisoning?

A. As near as my recollection, he said I had blood poisoning.

Q. And that was the first part of April? [230]

A. It was somewhere right in there, I couldn't recall the exact date of that. It might have been the middle of April by then, which I believe it were.

Q. When, actually, did you go outside.

A. I went outside the 29th day of May, 1948.

Q. And you took Campbell into partnership when?

A. I believe somewhere around about the 1st of April was when I hurt my finger. He had been working for me all the time before.

Q. Didn't you testify yesterday that the reason you took him into partnership for no payment was that you knew you were going to have to go outside? A. No.

Q. You did not so testify?

(Testimony of Vern Humphries.)

A. Not the way the question has been asked me.

Q. In any event, did you not take Campbell into partnership before any blood poisoning developed?

A. I had taken—I so stated as yesterday in the way it happened—when I mashed my finger off I asked Mr. Campbell to take charge of the restaurant because I was in bed for about a week.

Q. How much money did you owe to Hy's Cab, if any?

A. I don't owe any money to Hy's Cab.

Q. Did Hy's Cab ever make any trips to Palmer or the vicinity of Palmer for you? [231]

A. No.

Q. When your house burned can you recall about what date that was?

A. That was the 1st day of October. I didn't know of it until the 1st of December.

Q. You were outside at the time, is that correct? A. Yes.

Q. Now, who had occupancy of your house at that time? A. Frank Jones.

Q. Under what sort of an arrangement?

A. I rented his house until I returned.

Q. In other words he was paying you rent for your house? A. Yes.

Q. And when did you return?

A. I returned in January, 1949—no, I was up here in December, about the 27th of, 1948.

Q. And stayed for how long?

A. I stayed until the 19th day of January.

(Testimony of Vern Humphries.)

Q. Then did you return again after that?

A. Yes, I did.

Q. About when?

A. I returned then about—I believe about the first part of March, 1949.

Q. Were you here during February, 1949?

A. It was either the latter part of February or the first [232] part of March that I returned.

Q. When you returned in December did you go out to your house to see what damage had been done? A. Yes, I did.

Q. And how much damage had been done?

A. Well, the place had already been estimated of the damage inside of it by a contractor here.

Q. And was the estimate \$2600? A. No.

Q. How much was the estimate?

A. The estimate was \$648.48.

Q. And was the house then repaired?

A. I repaired the house myself.

Q. Do you mean with your own labor?

A. I hired some labor.

Q. Well, it was insured, wasn't it?

Mr. McCutcheon: Just a moment, objected to as incompetent and irrelevant and immaterial.

The Court: Objection is sustained—not relevant whether it had been insured or not.

Q. (By Mr. Cottis): Mr. Humphries, the house, when you returned in December, was it still in the possession of the Jones'? A. No.

Q. Who had possession of it then? [233]

(Testimony of Vern Humphries.)

A. Well, by rights no one did but the key had been turned over to the U. S. Marshal.

Q. Now, had that been done before or after the fire?

A. That had been done after the fire. But it is only hearsay talk, all I know is what I was told when I came back up.

Q. You had your records in that house? Let me put it this way, did your records in that house—were they in a metal filing cabinet?

A. No, not all of them.

Q. Were some of them in trunks? A. No.

Q. Were some of them in a metal filing cabinet?

A. Some of them were, yes.

Q. That had a lock on it? A. Yes.

Q. Was it locked? A. Yes.

Q. Was that filing cabinet burned?

A. No.

Q. Was it injured at all by the fire?

A. I don't know.

Q. Well, didn't you see the filing cabinet again when you returned in December?

A. I found the filing cabinet in December.

Q. Where was it? [234]

A. It was in a Hy's Cab stand.

Q. And had the lock been smashed or anything like that?

A. I wouldn't know. I think they had the lock changed.

Q. What about the rest of your records and documents?

(Testimony of Vern Humphries.)

A. All I know is hearsay talk what happened.

Q. Never mind it. Did you find any documents that were partly burned?

A. I didn't find nothing. They said there was a lot of stuff piled outside of the house in the snow from the fire, but there was too many feet of snow and I never bothered with anything. Some of my furniture and so forth was missing out of the house, too.

Q. Frank Jones had had that house strictly as a tenant, is that right?

A. Yes, so far as I know.

Q. There was no contract of sale to him?

A. My wife was dickering a sale with him.

Q. Had you stayed away from Anchorage longer than you intended? A. I don't know.

Q. When you left Anchorage in May, 1948, did you intend to return and be a resident of Anchorage?

A. I never had no intentions of living anyplace else.

Q. But right now your residence is in Kansas, is that right? A. Yes. [235]

Q. And it was in Kansas before you came to Anchorage, is that right?

A. No, that is my wife's home.

Q. Do you owe Frank Jones or Hy's Cabs any sum of money right now?

A. I don't owe him one cent.

Q. Did Hy's Cabs ever bring any moose meat

(Testimony of Vern Humphries.)

down here for you? A. For me, no.

Q. Were any of your records at all preserved?

A. No.

Q. How did you happen to have the canceled check for \$240 payable to the City of Anchorage?

A. The checks were left with the bookkeeper and at the Bank of Alaska, which we wrote to the Clerk of the Court up here or to the Marshal about Mr. Albert in Kansas and requested for all the papers to be picked up at this house and also requested that the bookkeeper here get all papers from the bank and send them to us. We got a special letter from the United States Marshal here in Anchorage stating that because of the fire down there, they remembered of seeing papers and a bunch of stuff, but later they returned to get them for me and ship them back east and they said the papers were all destroyed.

Q. And how does it happen that that check was not destroyed?

A. The checks—that check were not in the house, it was in the Bank of Alaska. [236]

Q. Were all your cancelled checks in the Bank of Alaska?

A. All of the business that was being done at the Panhandle was in there—of the Bank of Alaska.

Q. So any bills that were paid for by check by the business operated by you and Mr. Campbell would be evidenced by cancelled checks that were at the Bank of Alaska, is that correct?

(Testimony of Vern Humphries.)

A. Yes, we have those checks.

Q. Now, do you have a check showing the repayment to Blackard of \$450? A. No, I don't.

Q. And all the equipment was bought by cash, is that correct? A. By cash and by check.

Q. Well, you have cancelled checks for any equipment items?

A. I would have to go through them and see. I know there is one or two that I have—small ones.

Q. For example, did you buy a dishwasher from Northern Supply Company?

A. Yes, I did.

Q. And what was the total purchase price?

A. I believe, as near as I can remember, was \$255.

Q. And how much did you pay on it?

A. I paid either \$100 or \$150, somewhere around in there. I believe \$150.

Q. That had been paid by check?

A. By check. [237]

Q. And that check you couldn't produce?

A. Yes, I can.

Q. Were there any items in your inventory—your stocks of foods and so forth—that were not paid by check?

A. Yes, there were. I paid by cash for several items.

Q. Can you recall what items you paid for with cash?

(Testimony of Vern Humphries.)

A. I don't know. I paid Pay 'n Take It Grocery Store, I know I paid them every day in cash—small bills that we charged there.

Q. In connection with the business operation?

A. Yes, and also paid them by check too.

Q. Isn't Pay 'n Take It a retail establishment?

A. Yes, it is.

Q. Did you buy your food supplies there for the restaurant?

A. Just a small proportion.

Q. Where did you buy most of your food supplies?

A. Most of them was bought from the Grocery Supply.

Q. And did you pay Grocery Supply with cash or by check?

A. I paid them always by check when I paid them.

Q. So you would have all checks showing how much you paid Grocery Supply for food?

A. That I paid and I also still owe them a bill.

Q. How much do you still owe them?

A. I owe them somewhere around \$3,000.

Q. Is that all from foods that you used at the Panhandle? [238]

A. I don't quite get you clearly on that.

Q. Was that approximate amount of \$3,000 incurred between March 6, 1948, and May 21, 1948?

A. That was about the last bill was about somewhere starting around the 10th of April until I closed out. But I paid them cash up until the 1st of April.

(Testimony of Vern Humphries.)

Q. Did you not just testify that you always paid that particular concern with checks?

A. What concern

Q. Grocery Supply. A. Yes.

Q. Well, did you not also just testify that you paid them with cash until the first part of April?

A. Isn't a check cash too, it is money, that is the way I mean it. I paid them by check.

Q. When you have talked about cash, then, you have included check in that term?

A. Grocery Supply, yes.

Q. Well, now, when you state that you bought equipment items with cash, do you mean that you bought them with checks?

A. I paid cash with it. Some of it by check, some by cash, and some by travelers checks, but it was all paid for.

Q. Well, now, using the word "cash" as distinguished from checks, travelers checks, bank drafts or anything in that nature, did you pay Clyde Graves in cash or by check? [239]

A. In cash.

Q. And did you repay Blackard his \$450 in cash or by check? A. In cash.

Q. Did you at any time give Clyde Graves any check or bank draft?

A. Not to my knowledge.

Q. When you purchased Mr. Havins' interest in the restaurant business did you pay him in cash or by check?

(Testimony of Vern Humphries.)

A. Mr. Jones, I believe, paid him.

Q. Do you know whether it was in cash or by check?

A. I don't know; I don't remember.

Q. Was a bulk sales affidavit delivered to you or to Mr. Jones, if you know, at that time?

A. Well, what kind — what sale, what does it cover—I don't quite——?

Q. Did any documents change hands at the time that Jones purchased Havins' interest?

A. It was supposed to have been done in Stan McCutcheon's office that Richard Jones bought out Kenneth Havins, but as far as my knowledge, I don't know whether I ever seen the paper or not.

Q. Did you testify yesterday that Havins had to leave because of Joe Blackard did not approve of him?

A. That was Joe Blackard's statement to me.

Q. And Jones had to leave because Blackard did not approve [240] of him?

A. That was what Joe Blackard demanded.

Q. Did you testify that there was friction between Blackard and Jones?

A. Yes, there were at that time, later they became close friends although I never did know why.

Q. Was there friction between Havins and Blackard

A. I don't believe so.

Q. When Havins sold out to Jones did Blackard consent to the sale?

A. Yes, he did.

Q. Orally or in writing?

A. Orally.

(Testimony of Vern Humphries.)

Q. And when Jones sold out to you did Blackard consent to the sale?

A. Yes, he told me to get rid of Jones.

Q. When you sold or gave a half interest to Marvin Campbell did Blackard consent to that?

A. Yes, Joe Blackard—I had my finger mashed and he came down to my house to see me and I told him at that time and he didn't make no comments one way or another on it so I guess it was all right, nothing was ever said.

Q. In connection with the two agreements dated February 4th, 1948, and signed by you, Havins and Blackard, did you testify yesterday that those agreements were changed later by oral [241] agreements among you?

A. We agreed, it wasn't anything in the contract being changed only that we agreed upon certain terms, that they would stand certain bills if they got an extra four and one-half feet. That is just about—I don't know what you would call it—but that is what had taken place.

Q. After those agreements of February 4th had been signed, did construction for everybody proceed right away?

A. Will you speak that again, I didn't quite get it?

Q. After those agreements of February 4th, 1946, had been signed, did construction for everybody proceed right away?

A. What agreements do you refer to?

(Testimony of Vern Humphries.)

Q. Plaintiff's Exhibits 1, 2 and 3, the agreements between you, Havins and Blackard?

A. Yes, after the contract they started in. They had closed down while the building was being remodeled.

Q. And that went right ahead from that date forward?

A. Why, I guess so, yes.

Q. You were around at the time, weren't you?

A. Yes, I was there.

Q. That is, beginning shortly within a day or two after February 4th the remodeling progressed right ahead?

A. Yes.

Q. And it was March 6th before it was completed enough so that you could open? [242]

A. Yes.

Q. During that period from February 4th to March 6th were there any stalemates or pauses in the remodeling or did it go ahead continuously?

A. Any stalemate.

Q. Did the remodeling halt anytime during that period? Did it stop?

A. It stopped for a while, yes.

Q. For about how long.

A. Oh, it stopped for several hours.

Q. There were no long drawn-out work stoppages or anything of that nature?

A. No, they weren't. You see the only work that we stopped was to Larry Starns' liquor store and a couple of men that were going to move my counter further back they only stopped—I have an idea three or four or five men.

(Testimony of Vern Humphries.)

Q. You were around during that remodeling period? A. I was there every day.

Q. Joe was around during that period?

A. Yes.

Q. Was Starns around during that period?

A. Yes, Starns was, went outside for three or four days or something like that and in the meantime I don't recall, but I do know that he made a short trip somewhere, but he was around there every day too. [243]

Q. Was Phillips around during that period?

A. Yes, Phillips was in and out.

Q. Now, while the remodeling was going on did you and Starns and Blackard have conversations from time to time about it?

A. Not only but about one time.

Q. And when was that and what was that conversation?

A. Well, that was when Mr. Starns decided he wanted more space.

Q. And will you state what you can recall of that conversation?

A. Well, I refused to let them take the space one morning about nine o'clock in February. I say it was somewhere around the middle of February.

Q. Whom did you refuse — workmen or Mr. Starns? A. Mr. Starns and Mr. Blackard.

Q. And then was there a discussion about the matter? A. Yes, there were.

Q. And will you state what you can recall of that?

(Testimony of Vern Humphries.)

A. Well, I consulted with my attorney, Stanley McCutcheon, and we discussed it then with Larry Starns and Joe Blackard. I think in the presence was Larry Starns, Joe Blackard, Marvin Campbell and myself and I believe that Glen Phillips was around in there.

Q. And Mr. McCutcheon?

A. Mr. McCutcheon only was there only for just a few minutes [244] and left out.

Q. All right, now, what was the discussion, what did you decide at that conference?

A. Mr. Starns wanted four and one-half more feet for his liquor store, which would call for removing all the plumbing and the fixtures further back. It would run into a lot more money. I would lose five stools off the counter and I refused doing so. Then Mr. Starns said that he would take—turned around and said “Damn it, we will take and stand the cost of the moving extra of that if you will allow us to remove the stools. I need this space.” Our discussion was made on the \$3,000 bond and Larry Starns says “I will go good for it” and Joe said “That is good enough for me and we will forget it” and the work went right on remodeling the liquor store.

Q. Now, will you relate who was present at that conversation, again?

A. Larry Starns, Joe Blackard, Marvin Campbell, myself, Vernon Humphries, and I know—I believe that Stan McCutcheon walked over there with me for a period of a few minutes.

(Testimony of Vern Humphries.)

Q. Was there anybody else present?

A. Not to my knowledge. I demanded from a couple of carpenters, which I don't remember their names, I told them to leave my counter alone until such time as I agreed upon it to be moved.

Q. Now, was that the only discussion you ever had about that \$3,000 bond? [245]

A. With Joe Blackard? Yes, it were. It was a settlement of the bond anyway.

Q. About what date was that discussion, Mr. Humphries?

A. I say it was somewhere around the middle of February or it could have been a little bit later, I don't remember the exact date. It might have been near the first of March, but I know it was along in there somewhere.

Q. I am going to read you a paragraph from an affidavit signed by Vernon Humphries and sworn to before S. M. McCutcheon on May 17, 1948, which is part of the Court's files.

Mr. McCutcheon: I object to Mr. Cottis reading an affidavit. Despite the fact that it is in the Court files it is not in evidence in this case, Your Honor, and I submit that it is improper.

The Court: The paper should be submitted to the witness before he is interrogated about it.

Mr. McCutcheon: If the Court please, I would like to ask Mr. Cottis if he is going to endeavor to impeach the witness with this document?

Mr. Cottis: Yes, indeed.

(Testimony of Vern Humphries.)

Mr. McCutcheon: Then I submit it should be shown to the witness first.

The Court: I have just so ruled.

Q. (By Mr. Cottis): Mr. Humphries, I show you what purports to be an affidavit [246] sworn to May 17, 1949, by you, which is on file in this case——

Mr. McCutcheon: I object to Mr. Cottis testifying as to what this document is, Your Honor. It is not the proper way to identify it. Mr. Cottis isn't under oath.

The Court: Submit the document to the witness and ask him.

Q. (By Mr. Cottis): Will you describe what this is?

A. I can see better without the light, Your Honor.

Mr. McCutcheon: If Mr. Cottis is about to impeach him, I object. I submit to the Court that the proper procedure is to ask him if he did or did not say at the time and place and in the persons' presence.

The Court: Counsel said a moment ago that the document should be presented to him. If it is his affidavit then counsel can interrogate about it.

Q. (By Mr. Cottis): Did you sign this affidavit, Mr. Humphries?

Mr. McCutcheon: Object to the question, improper and incompetent.

The Court: Overruled.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Is this your signature, Mr. Humphries? A. I believe it is, but——

The Court: Read it. You may read it all.

Q. (By Mr. Cottis): Will you go ahead and read it and take your time?

A. Yes, sir. I believe there was a slight error made in this, just an error of print.

The Court: Just continue to read it, don't make any statements until you are asked about it. Counsel may proceed.

Q. (By Mr. Cottis): Is it your signature?

A. Yes, it is.

Q. What was the slight error that you wanted to tell about?

Mr. McCutcheon: Objected to as being incompetent, irrelevant, improper.

The Court: Overruled.

The Witness: I just don't like the way it is worded. I don't quite get the name of Harold Brand.

Q. (By Mr. Cottis): I don't quite understand what you mean by you don't get the name Harold Brand?

Mr. McCutcheon: Now, I submit, Your Honor, that is not a question and I object to counsel testifying. -

The Court: Counsel may restate the question.

Q. (By Mr. Cottis): Will you explain what you mean when you say "I don't quite get Harold Brand?"

(Testimony of Vern Humphries.)

Mr. McCutcheon: If the Court please, may I renew my objection on the ground it is an improper method of endeavoring [248] to impeach the witness. I don't believe counsel can impeach the witness with this affidavit, but I object to the manner in which he is getting it to the jury.

The Court: Overruled. You may answer.

Mr. Cottis: Read that.

(Question read.)

The Witness: Oh, in the presence of Harold Brand, I get it.

Q. (By Mr. Cottis): Is there anything else about this affidavit that you would like to explain?

Mr. McCutcheon: Objected to as incompetent and improper, irrelevant.

The Court: Objection is sustained.

Q. (By Mr. Cottis): You do recall signing this affidavit, do you? A. Yes.

The Court: Court will stand in recess until five minutes past three.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Mr. Humphries, when was it that you claimed Blackard [249] closed the storeroom?

A. It was somewhere around about the middle of April.

(Testimony of Vern Humphries.)

Q. Was it before or after the termination notice was served on you? A. It was the same day.

Q. That he closed the storeroom up?

A. Yes.

Q. And you are sure of that?

A. To the best of my knowledge.

Q. Could it have been April 18th?

A. There could be a day there more or less. I couldn't swear to the exact day but to my memory it seems as though it were on the 15th.

Q. Could it have been as long after as April 20th? A. It was in April anyway.

Q. You are not sure whether it was before or after the notice was served on you?

A. It was somewhere right in there, to my memory, the best that I think I know it was the same day.

Q. We are talking about the closing of the storeroom now? A. Yes.

Q. In your Complaint, Mr. Humphries, you allege that the defendants interfered with the delivery of fuel oil to you, when would that have been?

A. That was somewhere in the month of April, too. [250]

Q. Do you recall now whether that was before or after the notice was served on you?

A. I believe the fuel oil—it was somewhere right around in there, I think it was right afterwards.

Q. When was it that they started locking the doors to the premises when the bar closed?

(Testimony of Vern Humphries.)

A. That was in February.

Q. That was in February?

A. Or, I mean in April.

Q. And was that before or after the notice was served on you?

A. The locks of the doors was changed, I believe, the day that the notice was served.

Q. Did the defendants ever shut off the cooking range? A. Pardon?

Q. Did the defendants ever shut off your cooking range?

A. According to a complaint — a story I was told; I wasn't there to see it done.

Q. When were you told that?

A. I was told that on the night of the 15th of April or either 15th or 16th of April, I am quite sure it was the 15th of April, it was somewhere in there though. The exact date I can't just recall, but I believe that is it.

Q. What date did you say the fuel oil delivery was interfered with?

A. About sometime in the middle of the month of April, somewhere [251] along in there.

Q. Could it have been as late as May?

A. I couldn't quite swear to it that the oil fuel was denied. I remember that I was told, and that was only hearsay talk, too, Joe didn't tell me himself.

Q. Who did, Eisenhower?

(Testimony of Vern Humphries.)

A. I don't recall just who it was now, to tell you the truth about it.

Q. How did you find out that the storeroom was closed?

A. I—because I seen a new lock on the door.

Q. Did Blackard tell you that he had changed the lock? A. Yes, he did.

Q. And about what date do you think that was?

A. That was the middle of April.

Q. You don't recall whether it was before or after that notice was served on you?

A. It was right in that time.

Q. Is this your signature? A. Yes, it is.

Q. Will you tell me what this document is?

Mr. McCutcheon: Is this for the purpose of impeaching the witness, Mr. Cottis?

Mr. Cottis: Yes.

Mr. McCutcheon: I submit, Your Honor, that the question is improper, incompetent, the witness doesn't have to testify [252] as to what Mr. Cottis shows him.

The Court: Overruled. Does counsel wish to proceed further?

Mr. Cottis: I didn't hear the answer to the question.

The Court: What was your answer to the question?

The Witness: Will you speak it again?

(Question read.)

The Witness: Yes, it is a restraining order.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Do you want to change any of your testimony regarding dates that you just gave? A. Not that I know of.

Q. Have you read that doceument all the way through?

A. I read the first two pages, yes.

Q. Do you recall signing that document?

A. Yes, I do.

Q. When was it signed?

A. I have an idea the same day it was filed. I am not for sure. I didn't file it.

Q. What was the filing date?

A. The filing date is May 7, 1948.

Q. And that document was sworn to by you?

A. Yes.

The Court: Has counsel any other questions?

Mr. Cottis: Yes, Your Honor. [253]

The Court: Then I think you ought to proceed with them, then.

Q. (By Mr. Cottis): Are the dates shown on that document incorrect?

A. What date are you referring to?

Q. The date of May 5th?

A. It is probably correct, I signed it.

Q. It is not consistent with your recent testimony, is it?

The Court: Counsel shouldn't make such remarks in the presence of the jury.

Mr. Cottis: Sorry, Your Honor.

Q. Mr. Humphries, during the period between

(Testimony of Vern Humphries.)

April—February 4th and March 6th, you stated that Mr. Starns was not there for a few days——

Mr. McCutcheon: Objected to.

Q. ——is that correct?

Mr. McCutcheon: Excuse me.

A. I didn't quite answer it that way. I said I was — I believed that he was out for a short time, I couldn't swear that he were because I didn't see him leave.

Q. (By Mr. Cottis): How many days do you think he was absent between February 4th and March 6th? A. I couldn't swear to that.

Q. Can you give any estimate at all? [254]

A. No, I wouldn't because it would be only guess work.

Q. When was it, to the best of your recollection, that you had the conversation about waiving the bond?

A. It was somewhere in February or around the first of March, it was at the time of the building of the liquor store, that I know for sure, but the exact date on it I don't know for sure.

Q. You do know it was before the opening on March 6th, is that correct?

A. Yes, it was before March the 6th.

Q. Did you testify that it was at least a couple of weeks after February the 4th, the date of the agreement? A. To my knowledge, yes.

Q. Were you in Anchorage, in February, 1949?

(Testimony of Vern Humphries.)

A. In February, 1949, yes, I were.

Q. Can you recall how long you were here during that period?

A. Oh, I was here about ten days.

Q. And can you recall the dates?

A. The date that I came here?

Q. And left?

A. No, to be truthful I can't, there was nothing assuring me of anything when I came here and during that time I was in the Court room here but I don't even recall the date I was in the Court room here.

Q. You stayed at the Westward Hotel, did you not? A. Yes, I did. [255]

Q. Assuming that the Westward Hotel records indicate that you and Marvin Campbell checked out at February 16th at 7:00 o'clock in the evening, can you tell me where you were on February 16th?

A. I don't recall of checking out at 6 o'clock in the evening. I don't recall the incident.

Q. Can you recall the day where you were after you checked out?

A. When I left here going back to the States, whether it was in February or the 1st of March, I had gone to the Northwest Air Lines.

Q. When you checked out of the Westward did you go directly back to the States?

A. Yes, I did.

Q. Did you visit your house when you were here in February?

(Testimony of Vern Humphries.)

A. I was only out to the back door.

Q. During the remodeling of the Panhandle in February of 1948, did you see Starns around just about every day?

A. I seen him around quite often. I might not have seen him every day but I seen him quite often. I wasn't keeping no record of him.

Q. Did you see him more than 15 times between February 4th and March 6th?

A. Sometimes I seen him a dozen times in a day but sometimes I might have went all day and never seen him, I couldn't swear to it. [256]

Q. Did you see him any more than 15 days during that period?

A. It would only be guess work, I couldn't swear to it because I have no way of proving it.

Q. Do you think you did?

A. To my knowledge, I think I did, but I wouldn't say for sure.

Q. Was Harold Brand present at the conversation when the bond provision of the contract was supposedly waived?

A. That I don't just quite recall, he was there, I think, at one time.

Q. Did Harold Brand work for you at that time?

A. At what date?

Q. Whenever the bond provision was supposedly waived?

A. On one occasion he were.

Q. Was he in your employ at the date of waiving that bond provision?

A. Yes, he were, I believe.

(Testimony of Vern Humphries.)

Q. Did you ever pay Joe any of the monthly charges provided for in that agreement?

A. What kind of charges?

Q. The agreement provides for 6% or \$200 a month, whichever is greater. Did you ever make any of those payments to Joe?

A. I gave him a statement of it for it to be deducted from the amount that he owed me.

Q. And how much did he owe you? [257]

A. He owed me somewhere around \$450 — between \$400 and \$500. \$208 for painters and helpers it was \$300 and some dollars and then paper was charged to me which I hadn't paid which neither had Joe paid but it was being charged to the cafe there and I presented him with that amount too.

Q. How much did all that total as nearly as you can remember?

A. I think the whole thing totaled somewhere around six or seven hundred dollars. I haven't seen the bills lately to really know the exact figure on it, but it was somewhere in there.

Q. Will you go through those items again, Mr. Humphries?

A. The labor was somewhere around—the painters was \$208 and then there could be some few cents. I am not giving it for absolutely a correct figure but it was right at that figure and somewhere around \$100 of helpers and somewhere around \$70 for mirrors, and then there was somewhere around \$250 or \$300 for paper and paint and

(Testimony of Vern Humphries.)

brushes and miscellaneous things that was bought at a paint store for the remodeling of the Panhandle which was charged to me.

Q. Did you pay that sum?

A. No, I didn't.

Q. Now, who charged it to you, do you know?

A. Yes, Paddock Paint Company, it is right up Fourth Avenue here up about two blocks from here on the left-hand side going up. I believe that is Haddock or some such name.

Q. Was that all that Joe owed you? [258]

A. Yes, that was all that Joe owed me.

Q. Did you not testify yesterday that you lent Joe some money so that he could open the bar?

A. No, I didn't state that.

Q. This six or seven hundred dollars that you claim Joe owed you, that was all incurred during the period of construction, was it, or the period of remodeling?

A. Yes, it were.

Q. Why didn't it show on Gottschaulk's statement when he computes the amount due to you from Joe?

A. You will have to ask the bookkeeper that, I couldn't explain it.

Q. Well, your gross receipts of May of 1948 were over \$3,000?

A. Yes, I have seen it; it is \$3,000 and some odd—one hundred or two hundred or three hundred, I believe, and some odd dollars, and some cents.

Q. During May?

A. During May.

(Testimony of Vern Humphries.)

Q. Do you recall what it was during April?

A. I couldn't be exact but I believe during April the account ran up there, I wouldn't say unless I had the figures to look at.

Q. Do you think it was more than \$3,000?

A. Yes, I think it were. [259]

Q. Now, Gottschaulk's statements that you refreshed your recollection with yesterday, can you tell me again what your receipts were for March? That was what that statement showed, wasn't it?

A. Yes, that was \$3,300 and some odd dollars and cents, I wouldn't say just the exact figure.

Q. So during each of those three months your receipts were in the neighborhood of \$3,000 or more?

A. I believe so. I would have to take and look at the books. I can't remember exactly day to day what we were doing.

Q. Why did your receipts hold up if Joe was injuring you so badly?

A. In May it fell way down, but just how much—I know our business was way off but I wouldn't say the total amount for that many days. It has been several months past without thinking of it.

Q. Did you not just testify that during May your receipts exceeded \$3,000?

A. I said I didn't think for sure.

Q. And that during April they exceeded \$3,000?

A. I wouldn't swear to it, if I had to guess, and that is only guessing.

(Testimony of Vern Humphries.)

Q. During March we know what the receipts were, don't we? A. Yes.

Q. Is your testimony now that the receipts might have been [260] lower than \$3,000 in May?

A. As I said before, without seeing it I would have to take and see it because I couldn't answer it to be truthful.

Q. You have something somewhere that shows those receipts? A. I don't know.

Q. Do you have something somewhere that show the receipts for April? A. I don't know.

Q. How does it happen that you have something showing the receipts for March?

A. Because we had written to Mr. Gottschaulk to send for our papers and this was one of them with these bank things that was in it and that is the only reason that I had that.

Q. And the April and May receipts did not accompany this — the April and May statements did not accompany this March?

A. They did not arrive with the checks and a few things that were sent back.

Q. Have you ever acquired of Mr. Gottschaulk where the May and April statements were?

A. He stated that he had sent everything that he had in his presence and I believe that I had already had some of them at my house. Now, I wouldn't make a statement of knowing the fact that I did because I can't recall at the present.

Q. To make it clear to the jury is it true that

(Testimony of Vern Humphries.)

despite the service on you of the termination notice on April 15th you [261] stayed in possession there until May 21st? A. Yes.

Q. And once again, because I don't think — I don't recall your clear answer to it, did you ever actually give Joe Blackard any money for your concession there?

A. Not in cash money, only had it deducted from what he owed me up on remodeling.

Q. You never did give him any cash money or checks?

A. For the restaurant receipts? No, I did not.

Q. Now, do you recall the four provisions that that termination of your contract was based upon?

A. I would have to see it to be exact upon all of them.

Q. Was one of them your failure to furnish a \$3,000 bond? A. Yes.

Q. And your testimony is that provision of the contract was waived, is that correct? A. Yes.

Q. Was another one of the reasons for terminating the contract your possession of illegal moose meat? A. So he claimed.

Q. Now, regarding that moose meat, did you testify that you were not guilty of the charge but that you pleaded guilty in any event?

A. Yes.

Q. Was Mr. McCutcheon with you when you entered the plea of [262] guilty? A. Yes.

Q. How much was your fine?

(Testimony of Vern Humphries.)

A. I believe it was \$300.

Q. Do you want to change your testimony at all?

A. I believe with court costs and my attorney's fees the whole thing was \$300. I made out one check which I have the check for yet.

Q. Now, was another ground for that termination your failure to pay the monthly charges for your concession?

A. I believe that is what is stated in it.

Q. And as to that is it now your testimony that you paid those charges by off-setting them against Joe's indebtedness to you?

A. That is the way it should have been done.

Q. Is that the way it was done? A. No.

Q. How was it done?

A. Joe just ignored the amount that he owed me.

Q. And did you ignore the amount that you owed him for monthly charges?

A. I presented him with the statement for it to be deducted and stated and asked for that way it be done.

Q. Who made up the statement for you?

A. My bookkeeper. [263]

Q. Who is that?

A. Mr. Harry Gottschaulk.

Q. Now, was another ground set forth in the termination notice the claim that you had not been paying your creditors?

A. I can't recall without seeing it — without

(Testimony of Vern Humphries.)

seeing that notice, I know there are several things on there but just without having it to refresh my memory on it I couldn't tell you exactly.

Q. Can you recall now how much you owed to business creditors on April 15th, 1948?

A. Well, I owed for groceries of around \$3,000, a little better.

Q. Did you owe anything else?

A. On what date?

Q. April 15, 1948?

A. Oh, I didn't even owe on April 15th, I didn't even owe \$3,000. On April 1st I didn't owe anyone and as my restaurant went along I charged other things and several things I paid. I don't know. If you recall any one item maybe I can answer it, but maybe guessing, it would be just guess work.

Q. Well, April 1st, you don't recall that you owed any bills, is that correct?

A. On April 1st, yes, I did owe a few bills, but I paid up, I believe the major things.

Q. Did you owe Bliss Construction Company any money? [264]

A. No.

Q. Did Bliss Construction Company ever claim to you that you owed them any money?

A. No.

Q. Did Bliss Construction Company do any work for you in the remodeling of the restaurant?

A. I believe that Bliss Construction did all the remodeling of the Panhandle and also moved my counter back and fixed it but they never presented

(Testimony of Vern Humphries.)

me with a bill to my knowledge. The understanding was that moving it further back and giving them space that Harry Starns and Joe Blackard were going to stand the plumbing bill and that is all I know about it. I know Mr. Campbell paid a large sum but what it were I couldn't say.

Q. Did Bliss Construction Company do the plumbing?

A. I couldn't swear to that, there was plumbers there but I don't even know their names.

Q. But so far as you know you did not owe Bliss Construction Company something more than \$3,000?

A. I never asked Bliss Construction Company to enter into a contract with me.

Q. Did Bliss Construction Company do the moving of the restaurant equipment to the south?

A. Yes, they did.

Q. In other words, Mr. Humphries, you now testify that Blackard waived the bond provision and that in consideration of that [265] waiving the bond provision you gave up your right to have a counter 33 feet long?

A. With an "L" shape of another 8 feet.

Q. It would have been 33 feet instead of 32 feet, is that correct?

A. It would have been 33 feet—33 and one-half feet one way and with the circle "L" on it would have been another 8 feet so that it would have been 41 feet in measuring the full length of the whole thing in diameter.

(Testimony of Vern Humphries.)

Q. Did you ever purchase any more than the 16 stools that came with the restaurant?

A. No, I did not. I had wrote for prices and got a catalog up on it but I hadn't placed an order for them.

Q. You had, did you not, a good number of catalogs in any event from your railroad operations?

A. Not to my recollection, I didn't have any.

Q. Mr. Humphries, the refrigerator that went to Sunshine Market, could it have been a Kelvinator refrigerator?

A. No, it was an electric, it was a straight-out electric refrigerator. I think there was a G. W. on it.

Q. It could not have been a brand of refrigerator known as Kelvinator, is that what you are telling me?

A. No, just what is a Kelvinator? Do you mean that is just the name?

Q. Yes. [266]

A. All I ever seen on the icebox, as near as I can recall, is a G. W. on the door.

Q. Mr. Humphries, on February 4, 1948 did you testify that the contract between you and Havins on the one hand and Blackard on the other was originally drafted by our office?

A. There was a contract first made out in your office.

Q. And did you testify that you left our office at about five o'clock in the afternoon?

(Testimony of Vern Humphries.)

A. Yes.

Q. And did you testify that you then went to Mr. McCutcheon's office and had changes made in the contract? A. Yes.

Q. And after the changes had been made and the contract was typed did you all sign it at Mr. McCutcheon's office? A. Yes.

Q. And then did you go across the street to the Panhandle and discuss it further? A. Yes.

Q. And then did you return to Mr. McCutcheon's office? A. Yes.

Q. And did you testify that you called Mr. McCutcheon down to his office from his home to retype the contract?

A. Yes, nearest of my remembering I did.

Q. And then you all signed it again on that night in the revised form, is that right? [267]

A. Yes.

Q. Now, Mr. Humphries, can you explain why it is that you were so careful to have a contract in writing on that day that you called Mr. McCutcheon down at night when as to the waiver of the bond provision nothing was ever put into writing?

A. I don't quite follow you, I don't know that there was any rush or anything, but I was buying the equipment and before I would buy the equipment I wanted to have a contract, what I was to get in that building, and it was Mr. Blackard, I believe, or it could have been me, one or the other, was seeing to it that it got signed that night. I

(Testimony of Vern Humphries.)

wouldn't swear one way or another on it but I know we had it signed up that night.

Q. And it is your best recollection that you had Mr. McCutcheon come down to his office that night to retype it? A. Yes.

Q. Now, can you recall, Mr. Humphries, in what respect that second contract differed from the first contract that had been typed at Mr. McCutcheon's office on that night?

A. Well, specifically stated, the contract is here, I can just by memory. I was left out of there the amount of space that I was supposed to, and I guess that is just as near, without reading the contract out, is just about as near as I know.

The Court: Counsel, this matter has been gone into several times by yourself in cross-examination and although I don't like to interfere with cross-examination there is a limit to what the [268] Court ought to permit. You have asked this witness all about the contracts and you have reiterated your questions and attacked it and attacked it from several directions, and now you are going back to the same thing so far as I can see.

Mr. Cottis: If the Court will indulge me?

The Court: Go ahead once more but this is the last.

Mr. Cottis: All right, sir, but I think there is one change in here that has not been brought out.

The Court: I doubt if there is any one thing in there that has not been brought out.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Mr. Humphries, in the first of the agreements that was signed that night, which is Plaintiff's Exhibit No. 1, do you find these words which appear in Plaintiff's Exhibit No. 3, referring to you and Havins, the words "* * * and allowed to move or sell additional equipment when agreement terminated * * *"?

A. Well, if it is in there and we signed it that is the way it is.

Q. But it wasn't in the first one that was signed, was it?

A. There can be several words added in there. I didn't type it, my attorney had typed it and I only signed it.

Q. And then the first agreement that was signed had nothing in it giving you the privilege of removing equipment?

A. I don't know. Now, will you ask me that question again?

Q. The first agreement which was signed that night, which is [269] Plaintiff's Exhibit No. 1, did it have anything in it giving you the right to remove equipment?

A. Giving me the right to move or remove?

Q. Remove on termination of the agreement?

A. I would have to read it. I have only looked at it that one night.

Q. Well, Mr. Humphries, you don't have to answer the question because the Exhibits speak for themselves.

(Testimony of Vern Humphries.)

Who were the people who did the labor for you on paper hanging?

A. Who did the work? I did the major work of it myself and Harold Brand did helper's work on it.

Q. Does that make up the total of the \$208 plus the \$100?

A. Per my labor, hanging of paper.

Q. That was the \$208? A. Yes.

Q. Do you recall what contractor had the contract for papering and painting the building?

A. Yes.

Q. Who?

A. He is a witness out here, I can't recall his name right now right off-hand but he had also—and he is a witness in here to my work.

Q. Did he have a contract to do the whole job?

A. No, he was only working by the hour by piece work and he [270] couldn't get to all of it and it was willing by him that I do the work. He did a large amount of work himself on the building.

Q. Mr. Humphries, where did the \$70 worth of mirrors go? A. Where did they go?

Q. Yes.

A. They hung in the men's rest room and the ladies' rest room.

Q. Where did you purchase those?

A. I purchased them at the N. C. Company for the Alaska Railroad and upon my termination there I brought with other equipment and so forth back

(Testimony of Vern Humphries.)

up home and Joe Blackard purchased them from me.

Q. Did he pay for them?

A. Not yet he hasn't.

Q. And they are \$70, is that correct?

A. They are \$70.35 apiece.

Q. Mr. Humphries, did you have any suppliers besides Pay 'n Take It and Grocery Supply?

A. Did I have any what?

Q. Supplies—food suppliers?

A. I had Grocery Supply.

Q. Yes, Grocery Supply Company, Pay 'n Take It and who else?

A. I had, I bought stuff from the Columbia Air Line Cargo. I bought from a number of people in town.

Q. Anybody else that you can recall? [271]

A. Why yes, I bought from a fellow selling war surplus, I can't recall his name either right now, it is Frank someone.

Q. Did you buy foodstuffs from him?

A. Yes, I did.

Q. And did you buy or procure any foodstuffs from the Post Exchange at Fort Richardson?

A. No, I never did.

Q. Mr. Humphries, in your restaurant at the railroad did you have gambling machines?

A. Did I have what?

Q. Gambling machines?

Mr. McCutcheon: Whoops, just a minute. I ob-

(Testimony of Vern Humphries.)

ject to that on the grounds that it is incompetent, irrelevant and doesn't pertain to the issue.

The Court: Objection is sustained.

Mr. McCutcheon: Move that it be stricken.

Mr. Cottis: May I be heard?

Mr. McCutcheon: Did the witness start to answer the question?

The Witness: No.

Mr. McCutcheon: Very well.

The Court: Yes, Mr. Cottis.

Mr. Cottis: Your Honor, a portion of this complaint is that there was card playing and gambling permitted on the Panhandle premises which distracted from the restaurant business and I [272] suggest that it is pertinent if Mr. Humphries in the premises he has completely under his control and which are a restaurant premise had any such equipment.

The Court: Objection is still maintained.

Mr. McCutcheon: May I ask the Court to have the jury disregard it.

The Court: Jury will disregard the question.

Q. (By Mr. Cottis): Mr. Humphries, what did Starns do to injure you?

A. In what way?

The Court: Does counsel mind if we take a recess now?

Mr. Cottis: Certainly not.

The Court: Court will stand in recess until five minutes past four.

(Testimony of Vern Humphries.)

(Short recess.)

The Court: Record will show all members of the jury present without objection, and counsel may proceed with the examination of the witness.

Q. (By Mr. Cottis): Mr. Humphries, was there a separate electric meter on the restaurant premises?

A. I can't recall whether there were or whether there wasn't.

Q. Were there not three meters right near the back door?

A. I think you are right but I am pretty sure of it but I wouldn't swear to it. [273]

Q. Mr. Humphries, did you testify that your average running daily inventory of foodstuffs and consumable supplies was about \$4,000?

A. I don't quite understand.

Q. Mr. Humphries, what was your average daily running inventory of consumable supplies?

A. It stayed more or less around \$4,000, or from three to four thousand, somewhere in there.

Q. You don't mean \$400?

A. I don't mean \$400, no, sir.

Mr. Cottis: Your witness.

Redirect Examination

By Mr. McCutcheon:

Q. You testified you borrowed a thousand dollars from Hoyt Motor Company, did you, Mr. Humphries? A. Yes.

Q. Do you have some papers there on your desk?

(Testimony of Vern Humphries.)

A. Yes, I do.

Q. Will you look through them with reference to this subject?

Mr. Cottis: Your Honor, I object because I don't recall this matter coming up on cross-examination.

Mr. McCutcheon: I do. It was testified to, Your Honor, that he borrowed a thousand dollars from Hoyt Motor Company; that he borrowed \$1500 from the bank.

The Court: I don't know when it originated but something [274] was asked about it on cross-examination. The objection is overruled.

The Witness: Yes, I have a check here.

Q. (By Mr. McCutcheon): Now, what is that that you have in your hand?

A. It is a check given on the bank—Bank of Alaska.

Q. What is the date of it?

A. The date is the 15th of March.

Q. Whose signature appears on it?

A. Hoyt Motor Company, \$1,000. Signed Alaska Food Service, Vernon Humphries.

Mr. McCutcheon: Offer it in evidence—one more question—is that the check of which you have paid back the thousand dollars that you borrowed?

A. Yes.

The Court: What is that? Let me see it first. It may be shown to counsel for the defendant.

Mr. Cottis: I object on grounds that it is irrelevant, Your Honor.

(Testimony of Vern Humphries.)

Mr. McCutcheon: I submit that it was opened up on cross-examination and that is proper rebuttal.

The Court: I don't recall whether it was opened up on cross-examination or not but it will be admitted and the objection will be overruled and exception noted. It may be admitted and read to the jury. Plaintiff's Exhibit 7, I believe. [275]

The Clerk: Yes, sir.

Mr. McCutcheon: "Bank of Alaska, Anchorage, Alaska, March 15, 1948. Number blank. Pay to the order of Hoyt Motor Company \$1,000.00, words and figures. Signed Alaska Food Service and signed Vernon Humphries."

Q. Referring to the diagram used on cross-examination, Mr. Humphries, what did you say those marks were?

The Court: Counsel is standing between some of the jurors and the witness.

Mr. McCutcheon: I am sorry. Can the jury members see what I am pointing to? There is usually a pointer somewhere around here.

The Witness: May I step down? I can't see quite so clear?

The Court: You may.

Q. (By Mr. McCutcheon): Now, what did you say, Mr. Humphries, those marks represented?

A. That mark there is a "one-armed bandit"—slot machine.

Q. Did you own that slot machine?

A. No.

(Testimony of Vern Humphries.)

Q. Do you know who did? A. Yes.

Q. Who did?

A. It was rented from Leo Tyler to Joe Blackard. [276]

Q. And the other ones, what are they?

A. That is the same and that one at the bottom is a phonograph—an electric phonograph.

Mr. McCutcheon: May I see file 5030, if the Court please?

Q. Now I hand you two items and ask you what they are?

A. This here is Larry Starns' liquor store.

Q. And this one?

A. And this one is the Panhandle Cafe and Bar.

Q. What are these two things?

A. They are pictures of the Panhandle premises.

Q. Are they a reasonable—are they a reasonable representation of the premises in picture form?

A. Yes, they were.

Mr. McCutcheon: Will counsel stipulate that they go into evidence?

Mr. Cottis: No, I will not.

Mr. McCutcheon: Very well.

Q. Now, you testified you borrowed \$450, did you, from Mr. Blackard? A. Yes.

Q. You testified, did you, that you paid it back?

A. Yes.

Q. And where did you say you borrowed the money to pay it back?

A. From Marvin Campbell and Delmar Ingram.

(Testimony of Vern Humphries.)

Q. I hand you two pieces of paper and ask you to tell me what they are?

A. Yes, it is a check and a draft upon a loan at the bank.

Q. Now, the first piece of paper?

A. That is a check.

Q. Is there a date on it? A. Yes.

Q. What is the date?

A. March 19, 1948.

Q. Who is that check payable to?

A. Delmar Ingram.

Q. What is the signature on it?

A. Alaska Food Service, Vernon Humphries.

Mr. McCutcheon: Offer it in evidence.

The Court: It may be shown to counsel for the defendant.

Mr. Cottis: Your Honor, I object on grounds of relevancy and on grounds the authenticity of the endorsement has not been proved.

The Court: Very well, let me see it.

Q. (By Mr. McCutcheon): Is that the check, Mr. Humphries, with which you paid Del Ingram the amount you borrowed from him to pay back Mr. Blackard? A. Yes, it is.

Mr. Cottis: Your Honor, the fact that Mr. Humphries paid [278] Mr. Ingram some money by check is no evidence at all of any payment to Mr. Blackard.

Mr. McCutcheon: I would like to be heard before you rule.

(Testimony of Vern Humphries.)

The Court: Objection is overruled; it may be admitted and read to the jury.

Mr. McCutcheon: "Bank of Alaska, Anchorage, Alaska, March 19, 1948. Number blank. Pay to the order of Delmar Ingram \$266.00 in both words and figures. Signed Alaska Food Service. By Vernon Humphries."

Mr. Cottis: May I ask that the endorsements on it be read too?

The Court: Endorsements may be read.

Mr. McCutcheon: Delmar Ingram appears to be the endorser. It is stamped Veterans Club, Incorporated on the reverse side.

The Court: Will counsel read the perforated part?

Mr. McCutcheon: It is perforated: Paid 3-22-48. Identification number at the bottom perforated 59-5.

Q. I hand you a piece of paper and ask you to tell me what it is?

A. Yes, it was a draft at the Alaska Bank by Marvin Campbell for \$300 which he loaned me.

Q. Is there a date on it?

A. Yes, there is.

Q. What is the date? [279]

A. Third month, 12th day, 1948.

Q. Is there a signature on it?

A. Yes, there is.

Q. What is the signature?

A. James Garene—G-a-r-e-n-e.

(Testimony of Vern Humphries.)

Q. I don't think anyone can hear you, Mr. Humphries?

A. Garvin, I believe, is the name. It is G-a-r-d-n-e-x it looks like to me. I don't know how to pronounce it.

Q. Now, again, will you state what that is?

A. Yes, that was a loan.

Q. What is this piece of paper?

A. This piece of paper here was a loan Marvin Campbell made at the Alaska Bank for \$300 which he give to me—he placed into the bank to my credit.

Mr. McCutcheon: I ask that it be marked for identification.

The Court: It may be marked as Plaintiff's Exhibit 9 for identification.

Q. (By Mr. McCutcheon): Now, once more I hand you Plaintiff's Exhibit 9 for identification and ask you to tell me what it is?

A. It is a loan of \$300 on credit to Marvin Campbell for \$300, Bank of Alaska.

Q. And is it signed? A. Yes, it is.

Q. By whom is it signed? [280]

A. Signed by James Garmek or some such thing I can't pronounce.

Q. Is there a date on it? A. Yes.

Q. What is the date?

A. Third month, 12th day, 1948.

Q. You testified, did you, that you paid the Northern Supply \$100 for a dishwasher, is that correct? A. Yes.

(Testimony of Vern Humphries.)

Q. Was it a dishwasher? A. Yes.

Q. Will you look through the papers before you and see if you can find something with reference to this subject?

Mr. Cottis: Excuse me, Mr. Reporter, will you read back Mr. McCutcheon's next to the last question?

(Question read.)

Mr. Cottis: Your Honor, I object on that question on the grounds that it is leading and, as a matter of fact, it was not Mr. Humphries' testimony. He testified that he had paid them \$150.

Mr. McCutcheon: Well, the witness has given the answer already, Your Honor.

The Court: No doubt it is leading and it is objectionable upon another ground, and that is, that the question is really not to the witness whether he so testified but the words are [281] virtually put in his mouth. Not having been objected to the answer may stand. Objection is denied.

Q. (By Mr. McCutcheon): Well, I apologize for the leading question. I was merely trying to shorten up the trial, sir.

Q. What is the paper you have before you, Mr. Humphries? A. It is a check.

Q. What is the date on it?

A. The date on it is March, 1948.

Q. And who is it payable to?

A. Northern Supply.

Q. And what signature appears at the bottom?

(Testimony of Vern Humphries.)

A. Alaska Food Service, Vernon Humphries.

Q. What does that check represent?

A. That check represents \$100 on a washing machine.

Mr. McCutcheon: Offer it in evidence.

Mr. Cottis: No objection, Your Honor.

The Court: It may be admitted and marked and may be read to the jury. It will be marked Plaintiff's Exhibit 10.

Mr. McCutcheon: "Bank of Alaska, Anchorage, Alaska, March, 1948. Number blank. Pay to the order of Northern Supply \$100 in words and figures. Signed: Alaska Food Service, Incorporated. Vernon Humphries."

The Court: How about the endorsement?

Mr. McCutcheon: Endorsement is a stamp Pay to the Order [282] of Bank of Alaska, Anchorage, Alaska. Northern Supply. Perforation Paid 3-6-48. And the identification number at the bottom of the check 59-5.

Mr. Cottis: What exhibit number is that?

Mr. McCutcheon: 10.

Q. Do you know Harold Brand, Mr. Humphries?

A. Yes, I do.

Q. Who is Harold Brand?

A. Harold Brand is a young cook—young fry cook.

Q. And did you ever employ him?

A. Yes, I did.

Q. And when?

(Testimony of Vern Humphries.)

A. Well, I employed him. He worked—he was a helper to begin with in February and when I opened on the 6th of March, well, he worked as fry-cook for me.

Q. Where is Harold Brand now?

A. I don't know for sure.

Q. Did you ask him to attend this trial?

A. Yes, I did.

Q. What did he say?

A. He said he would.

Q. Do you know whether or not he is here as a witness?

Mr. Cottis: I object as irrelevant, Your Honor.

The Court: Overruled, you may answer.

Q. (By Mr. McCutcheon): Do you know know whether he is here as a witness?

A. I went down to his house and was informed that he had already left town for a job.

Mr. Cottis: Object to as hearsay.

The Court: Objection to hearsay is sustained.

Q. (By Mr. McCutcheon): Do you have any trade other than being a cook, Mr. Humphries?

A. Yes, I do.

Q. What is that?

A. Interior decorator.

Mr. Cottis: Object to as improper matter not called for by the cross-examination.

Mr. McCutcheon: If the Court please, it is preliminary and counsel opened it up on cross-examination by asking Mr. Humphries about his work in

(Testimony of Vern Humphries.)

the Panhandle and I am attempting to—I am about to show that he performed services as a paper hanger there.

The Court: All right, the objection is overruled.

Q. (By Mr. McCutcheon): Now, did you perform some work in the Panhandle when it was being remodeled, Mr. Humphries? A. Yes, I did.

Q. And what was that work?

A. That was hanging paper and designing the interior work [284] inside the Panhandle.

Q. Who were you employed by?

A. By Joe Blackard and Larry Starns.

Q. Have you been paid?

A. No, I haven't.

Q. Now, who paid for the heat in the premises?

A. I paid for all the heat that came from the range and when the heat was on from the furnace, Mr. Blackard.

Q. How often was the furnace on?

A. It was broken down there, I know, and I don't know when they got it fixed up.

Q. Who paid for the lights?

A. I ended up paying for them.

Q. Who paid for the fuel?

A. I paid for the fuel.

Q. Has Mr. Blackard or Mr. Starns ever paid you for that? A. No.

Q. Now how much did you owe on April 1st, 1948, to creditors?

A. Oh, I would say somewhere around \$2,500 to \$3,000, somewhere around there.

(Testimony of Vern Humphries.)

Q. Were those bills current?

A. Yes, monthly current bills.

Q. Were you paying your bills regularly?

A. Yes, I were.

Q. Was your credit good, bad or indifferent?

A. Good.

Mr. Cottis: I object, Your Honor, it is asking for a conclusion.

The Court: Overruled.

Q. (By Mr. McCutcheon): Was your——

A. It was good.

Q. How was your credit after you closed your restaurant?

A. It was no good.

Mr. Cottis: Same objection, Your Honor.

The Court: Same ruling, overruled.

Q. (By Mr. McCutcheon): Did you pay your bills after the 1st of April?

A. No, I didn't. I paid some but I didn't pay my grocery bill or meat bill.

Q. And who do you owe a grocery bill and a meat bill?

A. Grocery Wholesale Supply I owe around \$3,000-\$3,300.

Q. Who represents the Grocery Supply?

A. Jack Barrett.

Q. Is he here as a witness?

A. Yes.

Q. For you?

A. Yes.

Mr. Cottis: Your Honor, I object to that and ask that it be stricken out as improper. [286]

The Court: Answer may be stricken. I think

(Testimony of Vern Humphries.)

that that is not proper at this time, if at all. Jury will disregard it.

Q. (By Mr. McCutcheon): Now, do you owe Frank Jones any money at this time?

A. No, I don't.

Q. Have you ever owed Frank Jones any money at any time?

A. In the winter time of 1947 quite often my wife called Hy's Cab Company to take my children to school and we run a currently account there at that time. It was around a few dollars a month.

Q. Did you owe him any money in March, April and May, 1948? A. No, I didn't.

Q. Did you ever owe him any money for hauling moose meat anywhere?

A. He never did haul any moose meat for me.

Q. Do you know if Joe Blackard owes him any money for hauling moose meat? A. Yes, I do.

Q. Did he owe him any money for hauling moose meat? A. \$145.

Mr. McCutcheon: Your witness.

Recross-Examination

By Mr. Cottis:

Q. Mr. Humphries, how do you know that Joe Blackard owes [287] Frank Jones any money?

A. Because Frank Jones told me direct himself.

Mr. Cottis: Well, Your Honor, I ask that the answer that he gave be stricken because his preceding answer was perjury because he stated that he knew and it was based on hearsay.

(Testimony of Vern Humphries.)

The Court: It is not perjury.

Mr. Cottis: Well, mistaken.

The Court: Do counsel wish to be heard on that?

Mr. McCutcheon: Yes, Your Honor. I asked him if he knew if Joe Blackard owed Frank Jones any money, to which he replied yes, and on cross-examination Mr. Cottis asked him how he knew and I think his answer is proper.

The Court: No, his answer is based upon hearsay testimony. Now it is true, we all know, that the Battle of Gettysburg was fought at one time, and I suppose that is all hearsay; but in courts of law what one person states to another ordinarily is not admissible in evidence. If the witness says he knows and then it is revealed that he knows because somebody tells him, that doesn't make it competent evidence, and therefore the motion is granted and the answer is stricken and the jury is instructed to disregard that answer.

Q. (By Mr. Cottis): Now, Mr. Humphries, how do you know that Mr. Blackard had some moose meat hauled by Mr. Jones?

A. Mr. Jones said he made a trip for him and hauled him some [288] meat to my house and my wife—Mr. Blackard was present—when Mr. Blackard approached my wife at home and said he had some meat for me and placed it on my front porch.

Mr. Cottis: Your Honor, I ask that his previous answer to Mr. McCutcheon's question be stricken regarding the moose meat for the same reason—it

(Testimony of Vern Humphries.)

is based on something that he says he was told by Mr. Jones.

The Court: Well, I don't know. Read the last answer, if you will?

(Answer read.)

Mr. Cottis: That is the answer to Mr. McCutcheon's question, on redirect examination.

The Court: Witness said something else about Mr. Blackard bringing the meat to his house and I am wondering whether that alters the situation. The jury is ordered to disregard the witness' statement on what Mr. Jones told him, it is not competent evidence and the jury shouldn't give any attention to testimony based on what somebody else told him. Now, if his testimony is based on what Mr. Blackard told him or what Mr. Blackard did that is another matter entirely. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Mr. Humphries, when was it that Mr. Starns and Mr. Blackard employed you as a paper hanger? A. In February. [289]

Q. About what part of February?

A. Well, starting somewhere in the neighborhood of around the 10th of March—10th or 11th of March. The first bill that I bought for paint and paper was March 11th, 1948, Panhandle Cafe and Bar.

Q. But, Mr. Humphries, remodeling was finished in the bar—didn't you testify that the remodeling was finished and everything open on March 6th?

(Testimony of Vern Humphries.)

A. I made a mistake here, this one is March 1st instead of March 11th. All the paper were not finished at March 6th. We were still hanging paper as we opened up and we had still some to do two or three days later on.

Q. Mr. Humphries, was this another oral contract?

A. Well, Mr. Blackard hired me personally.

Q. In a conversation or in writing?

A. In a conversation.

Q. Can you recall the conversation?

A. Yes.

Q. Will you relate it to the Court?

A. The paper that he had hired to do the work——

Q. Just relate the conversation or what you know of your own knowledge?

A. Joe Blackard was very disgusted with the slowness of the paper hanging and the painting of it.

Q. Will you just relate the conversation, Mr. Humphries? [290]

A. Mr. Blackard asked me if I would hang the paper and do the painting on account of the other painter's drunk.

Q. Aren't you forgetting something, didn't Mr. Starns ask you, too?

A. Yes, Mr. Starns asked me as well for his liquor store and so forth, which I did the work.

Q. Which one asked you first?

(Testimony of Vern Humphries.)

A. Well, I think both of them asked me just about all the same day, to tell you the truth about it.

Q. How much were they supposed to pay you for the work? A. Painter's wages.

Q. And what were they?

A. Painter's wages in Anchorage, Alaska, is \$3.75 an hour.

Q. What unions are you a member of?

A. I belong to the Master Contractor's in Seattle, Washington, which is recognized all over the world as a body union and I belong to the Cook's Local for a number of years.

Q. Are you recognized locally on this Master Contractor's Union? A. Yes, sir, I am.

Q. And were you at that time?

A. Painting is rather a hobby for me.

Q. Now, this was paper hanging, was it not?

A. Paper and hanging and painting.

Q. Both hobbies? [291]

A. Yes, I do both.

Q. Mr. Humphries, how many hours of work was there to do in Starns' Liquor Store?

A. There was 24 hours in paper hanging and painting and 24 hours in helper's time spent.

Q. That was in Starns' Liquor Store?

A. Yes, it were.

Q. And then how much was there to do in the Panhandle premises?

A. 70 hours. This other painter had two or three other men working there as well as myself as well

(Testimony of Vern Humphries.)

as this Harold Brand and I did not keep their time because Joe was paying them and I was keeping my own time which the man is here to testify.

Q. Mr. Humphries, why wasn't anything set out in your complaint in this action about this little indebtedness?

A. I could not answer that, I don't know for sure whether it were or wasn't.

Q. Did you ever bill Mr. Starns or Mr. Blackard?

A. Yes, sir.

Q. And do you have any copies of the bills?

A. I do have.

Q. And how much did you bill Mr. Starns?

A. \$150.

Q. And how much did you bill Mr. Blackard?

A. For my labor in there was \$208.37. [292]

Q. And then your helper's wages?

A. And the helper was \$2.50 an hour was \$100. There was two mirrors purchased at \$70. The whole total thing was \$79.87.

Q. When did you send any bills to them?

A. On the 1st day of April.

Q. Did you ever have any conversation with them about those bills?

A. Several times with Mr. Blackard but not with Mr. Starns.

Q. And will you tell me again about when it was that they made this deal with you that you were to do paper hanging for them?

A. Oh, it was somewhere along about the, I

(Testimony of Vern Humphries.)

would say, around the 10th of February, Maybe 15th, somewhere in early—middle of February.

Q. It was after the 4th of February when your contract was signed, is that correct?

A. That is correct.

Q. And it was before the 25th of February, is that correct?

A. Well, right off-hand, I could not—it had to be, it was somewhere around in there. It was in February that I started work in there and I had spent the sum of 70 hours in one place and 24 hours in the other.

Mr. Cottis: That is all, Your Honor.

The Court: That is all, Mr. Humphries, unless counsel has further questions to ask. You may step down, Mr. Humphries, [293] and another witness may be called.

Redirect Examination

(Continued)

By Mr. McCutcheon:

Q. The figure of \$3.75 an hour is the going scale for painters at that time which would be before some of their present raises. That included your materials, which you said you got at Paddock's?

A. No, that didn't include the materials; that only included paint brushes and your paper board and the tools that you use—scaling and stuff you use that way—and that was night work; in fact, it was \$4.75 but I knocked off a dollar an hour.

The Court: Anybody else have any questions?

(No response.)

The Court: That is all, Mr. Humphries. Another witness may be called.

Mr. McCutcheon: Mr. Prator, will you step forward and take the oath and take the witness stand?

Your Honor, I am informed and I believe that Mr. Prator has been present in the Court room during some of the testimony.

The Court: Have you been present in the Court room, sir, during the trial?

The Witness: No, sir, Your Honor, I haven't. The only time I came in was to speak to Mr. McCutcheon and at the time I don't know who was on the stand even. I walked in the front door and I had a word with Mr. McCutcheon and I walked right out again. [294]

The Court: Very well.

HARRY PRATOR

being called as a witness, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name, please?

A. Harry Prator.

Q. And where do you live in Anchorage, Mr. Prator? A. I live at 15th and East H.

Q. And where are you employed?

(Testimony of Harry Prator.)

A. MK Company.

Q. Did you have occasion to be in the Panhandle premises during the months of March and April, 1948? A. I did.

Q. Did you have occasion to see what businesses were being conducted there? A. I did.

Q. Do you know whether or not there were any card games going on there?

Mr. Cottis: I object, Your Honor, as leading.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know whether or not there were any card games going on there? [295] A. There was.

Q. And did you see them yourself?

A. I did.

Q. You are a former member of the Anchorage Police Department, are you not?

A. Yes, sir.

Q. How old are you? A. 33.

Q. Are you married? A. I am.

Q. Do you have any children? A. Two.

Q. Now, where were these card games located in the Panhandle premises?

A. They were located in the rear of the building just beyond the cafe.

Q. Did you ever have occasion to eat there at the cafe? A. I did.

Q. How often were you in there to eat?

A. I was there two or three times a week, I would say, maybe more often.

(Testimony of Harry Prator.)

Q. And were the games frequently in session?

A. They were.

Q. Were there a number of players or a few or none at all around the card games? [296]

A. There were a number of players.

Q. What were they playing, do you recall?

A. Well, no, I couldn't say truthfully what they were playing, but they bought chips and so on.

Mr. McCutcheon: Your witness.

Cross-Examination

By Mr. Cottis:

Q. Where did they buy chips, Mr. Prator?

A. From the dealer.

Q. And how many tables were there?

A. At this particiular time that I remember there were one table in operation, if I am not mistaken which I don't think I am there were three tables in the place. There were one in operation.

Q. And they were located between the restaurant counter and the south wall of the building, is that right? A. That is right.

Q. And you think there were three tables there?

A. I am almost positive there were three tables.

Q. Now, you say that your memory is—how many times do you recall seeing card games there?

A. Well, that I couldn't say, but I was in there two or three times a week, maybe more often, and I saw card games being played there.

(Testimony of Harry Prator.)

Q. Did you ever see a card game at more than one table? [297]

A. I don't remember if I did or not but I do remember seeing one table going.

Q. Do you remember very clearly, do you, seeing a card game at a table once?

A. More than once.

Q. More than three times?

A. More than three times, sure.

Q. More than ten times?

A. Well, I will say I saw a card game everytime I was in there when the card game was being played.

Q. Mr. Prator, can you pin down the months a little more specifically for us, what time of year this was?

A. I am pretty sure it was around March or April, maybe both months.

Q. Do you think that you ate in there three times a week for eight consecutive weeks?

A. Well, I couldn't say how long I ate there but I did eat there most of the time. The reason that I remember that, my wife was outside and I ate there most of the time.

Q. That is while she was gone you ate there?

A. Yes, sir.

Q. Can you recall when she left and when she came back?

A. She left in February and she came back in May.

Q. Can you remember what part of February it was when she left?

(Testimony of Harry Prator.)

A. Around the first part of February. [298]

Q. And she came back about what part of May?

A. Well, off-hand I don't remember just the date.

Q. Then you ate there to the best of your recollection during the entire months of February, March, April and part of May?

A. Not that particular place but I ate quite a bit there, yes.

Q. Were you eating there some in each of those months?

A. Well, that I couldn't be positive there because I don't recall just the date the cafe opened.

Q. How many times do you think you ate there altogether? A. Oh, of that I couldn't say.

Q. Did you ever eat there more than three times in any one week? A. Yes.

Q. How many times did you eat there in the week at which you ate there most frequently? Did you ever eat 7 days a week there?

A. I don't think I ate there 7 days a week.

Q. Were you ever in there when there was not a card game in operation?

A. Not that I recall.

Q. And, again, what is your estimate of how many times you were in there altogether?

A. Well, I couldn't estimate that.

Q. You estimated three times a week, didn't you?

A. Oh, well, I would say something like that, yes. [299]

(Testimony of Harry Prator.)

Q. And, now, could you estimate for us the number of weeks? A. No, I couldn't do that.

Q. Can you give us any estimate at all of how many times you saw card games in there?

A. No, I don't think I could.

Q. During that same period of time were you eating at other places occasionally? A. Yes.

Q. Did you observe any card games in any other places?

Mr. McCutcheon: Objected to, immaterial.

The Court: Overruled.

The Witness: Yes, I did.

Q. (By Mr. Cottis): And more than one other place?

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: Yes, more than one other place.

Q. (By Mr. Cottis): Did you observe any effect on the restaurant operation from the card players at the Panhandle?

A. No, I don't, I couldn't say that, no.

Q. When you first ate there, did the fact that there were players at this card table bother you?

A. Well, I couldn't say they bothered me, no, because when I was on the force I was working nights around places and I [300] suppose I got more or less used to that.

Q. When were you on the force, Mr. Prator?

A. December 18, 1946, to January 28, 1948.

Q. When you were on the force did you ever go

(Testimony of Harry Prator.)

into the Panhandle on Duty? A. No.

Q. Were you ever in the Panhandle when you were a member of the force? A. Yes.

Q. Were there card games in there during those visits?

A. That was the old Panhandle, I believe,—

Q. Yes.

A. —at the time.

Q. Were there card games in there?

A. Yes, occasionally.

Q. Were there more or fewer card tables than there were when Humphries was operating that restaurant?

A. I think there were about the same.

Q. And that is three, is that correct?

A. I think there were three, yes.

Q. While you were eating in there during the months of February and March, April, and possibly part of May, 1948, did you ever observe any other customer of Mr. Humphries who seemed to be bothered by the card table? [301]

A. No, I didn't hear anything about that.

Q. Were the card players that you observed in there noisy or quiet?

A. Well, they were noisy at times, yes.

Q. What time of day would you eat in there?

A. No certain time.

Q. Well, was it generally in the morning or at noon or at night?

A. In the evening and afternoon.

(Testimony of Harry Prator.)

Q. Did you ever have lunch in there that you remember? A. Pardon me?

Q. Did you ever have lunch around noontime in there?

A. Well, I don't think that I was down that early.

Mr. Cottis: No further questions.

Redirect Examination

By Mr. McCutcheon:

Q. Does any incident stand out in your memory with reference to card games, Mr. Prator, at the Panhandle? A. Well, yes.

Q. What incident was that, tell about it?

A. Well, one particular time I was in there, I ate and then I went over and I watched the games for a little while. There was some fellow, he seemed to be a habitual drunkard, he was sitting at the next table which was close to the one in operation and a chip fell on the floor and this fellow picked it up and [302] it made the dealer awfully mad, so he got up from behind the table and he told this fellow to get out. In fact, he kind of pushed him and helped him part of the way out—about half way of the building, I guess, and he went back to the table and I overheard him say that this fellow hung around the game there and every time a chip fell on the floor——

Mr. Cottis: Object to anything he overheard said, Your Honor.

(Testimony of Harry Prator.)

The Court: Overruled.

The Witness: This fellow would pick the chip up and if they let him keep it he would go over to the bar and buy a drink with it. He was more or less molesting the players there.

Mr. McCutcheon: Your witness.

Recross-Examination

By Mr. Cottis:

Q. About when did that occur, Mr. Prator?

A. Well, at the—you mean time of day?

Q. Well, time of day and time of the year, if you can recall?

A. No, I can't recall that, but it was in the evening.

Q. Was it while Kenneth Havins and Humphries were operating that restaurant? A. Yes.

Q. Did you go in there as frequently after Havins had left as you did before?

A. I did. [303]

Q. Have you known Havins quite a long time?

A. Only when he joined the police force, the first time I knew him.

Mr. Cottis: No further questions.

The Court: That is all, sir. That will conclude our work for today in this case.

Ladies and Gentlemen of the Jury, it has become necessary to hold a short term of Court at Cordova commencing tomorrow morning at ten o'clock and

therefore you are excused until next Monday morning at ten o'clock.

In the meantime you will remember your duty not to discuss the case among yourselves or with others or to listen to any conversation about it and not form or express an opinion until it is finally submitted to you.

You may retire and report next Monday morning at ten o'clock.

(Whereupon, at five o'clock p.m., Thursday, June 23, 1949, the case was recessed until ten a.m., Monday, June 27, 1949.) [304]

Monday, June 27, 1949

The Court: Roll of the jury may be called.

(Names of jurors called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called.

Mr. McCutcheon: Call Mr. Jack Barrett.

JACK BARETT

called as a witness, being first duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Mr. Barrett, will you state your full name and spell your last name for the Clerk.

A. Jack Barrett, B-a-r-e-t-t.

(Testimony of Jack Barrett.)

Q. You are one of the owners of the Food Center, are you not, Mr. Barrett?

A. That is right.

Q. Did you have occasion to do business with Vernon Humphries during the months of March, April and May of 1948? A. Yes.

Q. Does Mr. Humphries now owe you money?

A. Yes, he does.

Q. How much does he owe you, approximately?

A. Approximately \$3,000.

Q. Now, did you have occasion to be visited by Mr. Joe Blackard [307] during the latter part of May, 1948? A. Yes, we did.

Q. Did you have a discussion with him?

A. Yes.

Q. And will you state the nature of the discussion, what happened? Where did this take place?

A. It took place in our grocery supply warehouse which is in the terminal yards and he paid us a visit and he wanted to know if we were still selling Humphries merchandise and that if we were it was very foolish because they were—He stated that if we were doing business with Humphries in selling groceries on an open account it was rather foolish because he wouldn't be in business very long, that they were going to see that he was not operating much longer.

Q. That is the gist of the conversation with him?

A. He also advised that we go up there and pick up what groceries we had left up there, that we had sold.

(Testimony of Jack Barett.)

Mr. Cottis: Mr. Barett, that was in the latter part of May, 1948?

The Witness: Yes.

Cross-Examination

By Mr. Cottis:

Q. This \$3,000 account that Humphries and Campbell owe you, can you tell me over what period of time that accrued?

A. That was one month's bill plus a few days in the following month. Now, I don't have the statement of their accounts so I can't tell you the exact period but it runs about 40 days. [308]

Q. Can you recall whether it was March, April or May?

A. No, the only thing that I could tell you on that was that the previous month's business had been paid in full on the date when it was supposed to have been paid.

As I recall it, the March bill had been paid in full on April 10th. The April bill and running ten days, approximately, in May is the amount still owing.

Q. Did you ever suggest to Mr. Blackard that he should be responsible for Humphries' bills?

A. Well, I don't believe that that was ever mentioned.

Q. Is there a man by the name of Harry Andrews in your employ? A. Yes.

Q. Did you have any conversation with Andrews

(Testimony of Jack Barrett.)

relative to Blackard's possible responsibility for the Humphries bill?

A. No, I can't say that we ever seriously considered that Blackard would be responsible for that bill at all. It might have run in our mind that there might be a possibility but I don't believe it was ever considered seriously.

Q. Have you tried to collect that bill from Humphries? A. Yes.

Q. Have you had any success?

A. Not as yet.

Q. What steps have you taken in trying to collect it?

A. Well, it has been placed in the hands of the collection [309] agency.

Q. How long ago was that?

A. I would say approximately one year.

Q. About a year ago it was turned over to a collection agency, is that correct?

A. Yes, well, it is approximately a year, I can't tell you the exact date without looking them up.

Q. And no portion of it has been paid?

A. Not as yet.

Mr. Cottis: No further questions.

The Court: That is all.

Mr. McCutcheon: Call Harry Andrews.

Mr. Cottis: Mr. Barrett, we will want you as a witness for the defense so will you be available? We can telephone you.

HARRY ANDREWS

called as a witness, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Mr. Andrews, will you state your name, please, and spell your last name for the Clerk?

A. Harry Andrews. A-n-d-r-e-w-s.

Q. You work with Mr. Barrett at the Food Center, do you not? A. I work for him.

Q. Were you working there during the months of March, April [310] and May, 1948?

A. Yes.

Q. Did you have occasion to do business with Mr. Vern Humphries? A. Yes.

Q. Did you have occasion to have a conversation with Mr. Joe Blackard during the latter part of May, 1948, with reference to Mr. Humphries?

A. We have spoken to him quite a bit. He came down to the warehouse one day.

Q. You will have to speak up just a little bit.

A. He came down to the warehouse one day and we had a little conversation.

Q. Who came to the warehouse?

A. Blackard and his partner, I believe it was.

The Court: Blackard and who?

The Witness: His partner or a man, whatever his name is.

Q. (By Mr. McCutcheon): Do you recall his name?

(Testimony of Harry Andrews.)

A. I don't know the gentleman very well.

Q. And tell what was said?

A. Well, I can't recall what was said because I didn't say much—talk to them. I know Blackard quite well. I know them all quite well, that is, Humphries and Blackard. We are always talking. [311]

Q. You were subpoenaed to come here, is that right, Mr. Andrews? A. That is right.

Q. Will you tell what was said at that time with reference to Mr. Humphries?

A. I can't recall his exact words.

Q. What was the effect of it? What was the gist?

A. The gist was we were doing business with Humphries and that if we wanted to come out over and above that we should discontinue it and not give him any more groceries, that he wouldn't be in business very long or words to that effect.

Mr. McCutcheon: Your witness.

Cross-Examination

By Mr. Cottis:

Q. Mr. Andrews, had you had a previous conversation with Blackard respecting Humphries?

A. Oh, I can't say that we have had—I have talked to both of the boys quite a bit.

Q. Isn't it true, Mr. Andrews, that you suggested to Blackard that he might be responsible for Humphries' bill?

(Testimony of Harry Andrews.)

A. I suggested the Panhandle be responsible for Humphries' bill.

Q. That is, the ownership of the Panhandle might be responsible for Humphries' food bill?

A. That is right. [312]

Q. And that was prior to this conversation?

A. My job is to collect money. My job is to collect money in any way I can that is owing. If I can put pressure on people who owe us I do it.

Q. And you did intimate to Mr. Blackard that you might look to the entire Panhandle management for the Humphries' bill?

A. That is right; that is the way the account is set up on the Panhandle.

Q. And that is prior to this conversation that took place at the warehouse in the latter part of May?

A. I can't say prior or not but I do know it was right around there. I know I was working pretty hard trying to get my money.

Q. The partner of Blackard that you spoke about as having been present, was that Glen Phillips, do you recall?

A. I believe it was.

Q. Do you know Larry Starns?

A. I know of him, yes.

Q. Was it Larry Starns who was with Blackard?

A. It wasn't Mr. Starns, no.

Q. He was not with Mr. Starns?

A. No.

Q. Mr. Andrews, you have in your possession an inventory of the foodstuffs left at the Panhandle by Humphries?

(Testimony of Harry Andrews.)

A. I haven't been able to locate that inventory.

Q. You haven't? Do you recall about what the dollar amount [313] of that inventory was?

A. No, I never completed the valuation of it but I have an approximate idea of it.

Q. Will you tell me what that is?

A. All I valued on it was the merchandise that I had sold them which I knew was still in stock and I picked that merchandise off. It ran around \$400-\$450.

Q. And that was the complete inventory of consumable supplies?

A. Those were items that I sold them. There were other items on the inventory I hadn't sold them.

Q. What portion of the total inventory does those other items constitute?

A. Only a small part.

Q. Was the total amount of the inventory to the best of your recollection more than \$600?

A. I would say the inventory was—if I was buying it—I would pay \$800 for it.

Q. How much?

A. I would pay \$800 for it if I were buying.

Q. Would you pay as much as a thousand?

A. No, I would pay \$800.

Q. Do you recall when that inventory was taken?

A. Not exactly, no. I didn't take it.

The Court: What is that—You didn't take it?

The Witness: No, sir, I didn't take it. [314]

(Testimony of Harry Andrews.)

Mr. Cottis: No further questions.

Redirect Examination

By Mr. McCutcheon:

Q. This is an inventory sheet that you saw sometime after the place was closed, was it not?

A. It was an inventory that was taken to my knowledge after Vern—Mr. Humphries—was out of the place and it was taken by a competitor.

Mr. McCutcheon: Thank you very much.

Mr. Cottis: One further question, if the Court will indulge me.

Recross-Examination

By Mr. Cottis:

Q. Did Blackard request you to come down and take an inventory of Humphries' supplies?

A. I don't recall whether it was a request or not but I do know there was some talk of it and I believe he had asked another party to take that inventory for him.

Q. Has Blackard ever offered to you any inventory items that you had sold Humphries?

A. He suggested it one day that I come down there and take my merchandise out of there, if that is what you mean?

Q. Yes. Did you do it?

A. No, I couldn't do that.

Q. That was after the restaurant had been closed? [315]

A. That is right.

Mr. Cottis: No further questions.

Mr. McCutcheon: Thank you very much, Mr. Andrews.

The Court: Have the jurors any questions?

(No response.)

The Court: That is all, sir. Another witness may be called.

Mr. McCutcheon: Call Mr. Robison.

The Bailiff: Your Honor, Mr. Robison is not in the witness room.

Mr. McCutcheon: Call Mr. Spradlon.

The Bailiff: He is not in the witness room, only Mr. and Mrs. Jones and one other gentleman, I don't recall his name, are in there now at this time.

Mr. McCutcheon: Call Mr. Frank Jones.

FRANK V. JONES

called as a witness, having been duly sworn, took the stand, and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name please and spell your last name?

A. Frank V. Jones, J-o-n-e-s.

Q. What is your occupation?

A. Cab owner.

Q. And what cab do you own? [316]

A. I own Hy's Cab.

Q. Were you subpoenaed to come here?

(Testimony of Frank V. Jones.)

A. Yes, I was after 26 attempts.

Q. What?

A. 26 attempts trying to get me over here.

Q. Who has been trying to get you over here?

A. Oh, I guess you have and 26 other people.

Q. Do you have a contract with Mr. Starns to haul fares to Fort Starns? A. I have——

Mr. Cottis: I object to that as immaterial and completely irrelevant.

Mr. McCutcheon: I wish to show the relationship to the defendant, if there is any. This witness is a reluctant witness, Your Honor and we have had an awful struggle getting him here. He wasn't lying when he said that.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you have such a contract with Mr. Starns?

A. I have no contract with no individual, persons or business people in this town.

Q. Now, what cab company did you say you owned? A. I own Hy's Cab.

Q. Do you own any other cab companies?

A. Yes, I do. I own one-third interest in Richardson Cab [317] Company.

Q. Does that cab company have a contract with Mr. Starns?

A. That cab company has no contract with no one.

Q. Did you talk to Mr. Starns recently with reference to this lawsuit?

(Testimony of Frank V. Jones.)

A. I have never talked to Mr. Starns and I don't know Mr. Starns.

Q. Have you talked to Mr. Blackard recently with reference to this lawsuit?

A. I have never talked to Mr. Blackard on this case.

Q. Were you not visited by Mr. Blackard on or about the 23rd day of this month at your home on the outskirts of Anchorage by Mr. Blackard with reference to this lawsuit?

Mr. Cottis: Objection, Your Honor, it is leading.

The Court: Overruled.

A. The 23rd of this month I have never been visited by Mr. Blackard at my home.

Q. Were you on or about the 23rd, perhaps the 24th or the 24th or the 22nd visited by Mr. Blackard?

A. No, sir, not at my home.

Q. Well, has he visited you?

A. He has visited me but not on this case.

Q. Where at?

A. At my cab stand at 713½ Fourth Avenue.

Q. And when was that? [318]

Mr. Cottis: I object, Your Honor, it is irrelevant.

The Court: Overruled.

The Witness: If I am not mistaken it was Friday night about 5:15 in the afternoon when he called me. In fact he did not call for me in person, he called for a cab and I happened to be the one was

(Testimony of Frank V. Jones.)

in so I took the call to go to Mr. Blackard's house. I think the address is 725 Seventh Avenue, if I am not mistaken. And Mr. Blackard never said anything to me about this case.

I just told him "I guess I am going to have to go up on the witness stand about something on this case and I don't intend to want to go." I said "I don't want to get mixed up or involved in it any more than what I am."

Q. (By Mr. McCutcheon): Did you have occasion to have a conversation with Mr. Glen Phillips during the month of April toward the middle of the month of April, 1948, with reference to some moose meat?

A. I could not state that to be true about moose meat or what meat it was.

Q. Did you have a conversation with Mr. Glen Phillips?

A. I had a brief conversation on the 'phone, yes.

Q. And what was the nature of that conversation, tell if you can recall?

Mr. Cottis: I object, Your Honor, unless Mr. Jones can affirmatively state that he knows that it was Mr. Phillips he was talking with. [319]

The Witness: I cannot state that because over a 'phone you cannot state a voice of anyone.

Q. (By Mr. McCutcheon): Have you had occasion to discuss this lawsuit with anyone recently?

A. Yes, I had occasion to discuss this lawsuit with my wife.

(Testimony of Frank V. Jones.)

Q. And with anyone else?

A. No, sir, I have not.

Q. Did you have occasion to discuss the matter of your being subpoenaed with Mr. Grigsby?

A. I did not do—have anything to say to Mr. Grigsby, I just was out of town. I had some business appointments to make out of town and had some land that I was looking at for a cement factory here and I was on that—to go out of town to take care of that matter and I had my wife to call Mr. Grigsby and asked him if I had to go or what the things would be, because I had some very important business out of town to attend to besides sitting over here.

Q. Do you know Glen Phillips?

A. I know Mr. Glen Phillips.

Q. Do you know his voice when you hear it?

A. I cannot say that I recognize his voice to sit up here on the witness stand to say “Yes.”

Q. Did you have a conversation with Mr. Glen Phillips on the 'phone during the month of April, 1948, with reference to some [320] moose meat?

Mr. Cottis: I object, Your Honor, unless Mr. Jones knows it was Glen Phillips.

The Court: Overruled, that is the very question. He can answer it.

The Witness: I cannot swear to it, no, sir, and I won't.

Q. (By Mr. McCutcheon): Did one of your drivers have occasion to haul some moose meat about that time?

(Testimony of Frank V. Jones.)

A. Can I put this into my own story for the jury and yourself to straighten it up?

Q. Certainly you can.

A. I am up here to tell the truth and it is going to hurt someone, it might hurt me, I don't know. I would like to take it back a little further to tell when I knew Mr. Humphries and Mr. Blackard.

The Court: It is the duty of the Court to tell you that you are not compelled to say anything that may incriminate you. Now if the story is such that it may lead to your prosecution you are not obliged to say it. The Constitution of the United States provides that no one shall be required to incriminate himself. That doesn't mean that you shall give that as a fictitious ground for not telling the truth as to something that may be important in the case. But, nevertheless, the By-Laws of the Constitution do provide that nobody need to incriminate [321] himself. Now, with that in mind you may proceed.

Mr. McCutcheon: I would prefer to have these questions and answers to keep the record straight, Your Honor.

Mr. Cottis: Your Honor, the witness requested that he be allowed to tell his story and I ask his request be complied with.

Mr. McCutcheon: No, I object, Your Honor, he will undoubtedly——

The Court: You may ask questions.

The Witness: As everyone knows——

The Court: Just a moment, counsel is going to ask you questions.

(Testimony of Frank V. Jones.)

Q. (By Mr. McCutcheon): Did one of your drivers have occasion to haul some moose meat from Wasilla on or about the 15th of April—during the month of April, 1948?

Mr. Cottis: I object, Your Honor, unless the witness knows it of his own knowledge. From the phrasing of the question it seems apparent that it is a question that only the driver would know.

The Court: That is counsel's own conclusion. The witness is being asked as to what he knows and it is not well for counsel to thus instruct a witness not to answer.

Mr. Cottis: Very well, Your Honor. [322]

The Witness: As I was subpoenaed over here on the subpoena——

Mr. McCutcheon: Just a moment, I don't want to argue with you but the Court has instructed you that you don't have to answer any question that will tend to incriminate you.

The Witness: I am not going to.

Q. (By Mr. McCutcheon): Now, if you feel that this answer will tend to incriminate you, you need not state it. Now, did one of your drivers have occasion to haul some moose meat?

The Court: And you are to speak from what you know.

The Witness: I can't tell you the exact date but, yes, we did haul some moose meat from Wasilla.

Q. Did you instruct one of your drivers to haul——

(Testimony of Frank V. Jones.)

A. I never instruct my drivers to haul moose meat or any kind of freight.

Q. Did you instruct your driver to go there?

A. I never instructed. The call came to go to Wasilla and the man went.

Q. Who was the driver?

A. Hagil. I can't think of his last name right off. His first name is Hagil and he has driven at Red Cab right today.

Q. Now, what occasioned you to request your driver to go to Wasilla?

A. I never requested my driver to go to Wasilla because I [323] wasn't in the stand at that time.

Q. What occasioned—excuse me, go——

A. At that time I was not at the stand when the call came in.

Q. What occasioned your driver to go to Wasilla?

A. As far as I know the driver—there was a 'phone call came in.

Q. From whom?

A. From the Panhandle.

Q. And from whom in the Panhandle?

A. I cannot state who it was from because I can't verify it myself.

Q. Who did the person on the 'phone identify himself to be? A. Well——

Mr. Cottis: Your Honor, the witness has already testified that he doesn't know of his own knowledge.

The Court: He can answer this question if he knows.

(Testimony of Frank V. Jones.)

Q. (By Mr. McCutcheon): Who did the person on the other end of the 'phone identify himself to be?

A. I will ask one question, and I want to know if I can say it right or no, and then I can be straight in this, but I can't this way.

Q. Just answer that question, Mr. Jones?

A. I cannot answer that question. [324]

Q. Did the person on the other end of the 'phone identify himself? A. To me, no.

Q. Do you know who it was?

A. As far as I know——

Mr. Cottis: How could he know who it was.

Mr. McCutcheon: He might have recognized his voice.

The Witness: When this 'phone call——

Mr. McCutcheon: Just a moment.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know or not?

The Court: Answer to what you know.

The Witness: No, I cannot tell you that. I have answered you twice, no.

Q. (By Mr. McCutcheon): During the latter part of May at my office in the presence of Mr. Humphries, Mr. Campbell, myself, yourself, present, did you not say to me in substance as follows: "Glen Phillips called me on the 'phone and asked me to go to Palmer to pick up some stuff," did you or did you not make that statement?

A. I said that statement in this way, I says——

(Testimony of Frank V. Jones.)

Q. Did you or did you not make that statement at that time?

Mr. Cottis: I object to this arguing with the witness; let him answer in his own way. [325]

The Court: Overruled.

The Witness: I said it in this way: We got a 'phone call from the Panhandle and I do not answer the 'phone myself through the switchboard at my office. The 'phone call came to the switchboard operator as the operator, says "This is Glen Phillips at the Panhandle, will you send a cab to the Panhandle?" and she says "Yes"——

Q. (By Mr. McCutcheon): And——

A. ——and that is the same statement I gave you and as far as I know that was the same statement I gave you that day when you asked me the question.

Q. Now, let's have that all again just one more time, I want to have it clear?

A. I said the call came through from the Panhandle through my switchboard in my office. At the time now I have not got a switchboard but I did at that time. To the operator that is in my stand, said "This is Glen at the Panhandle. Will you send a cab up here to go to Wasilla. A man wants to go to Wasilla." And that is the statement I gave you that day. I don't know how you wrote it down but that is the statement I gave to you.

Q. About the 20th day of this month at the Anchorage Motors garage in the presence of Mr.

(Testimony of Frank V. Jones.)

Humphries, myself and other persons being present, did you not state in substance that Glen Phillips called [326] you on the telephone and asked you to send a driver to Wasilla? A. I didn't.

Q. And that the driver went to Wasilla and brought back some moose meat and put it in Vern Humphries' car? Did you not make that statement at that time?

Mr. Cottis: May it please the Court, I object, Mr. McCutcheon is not only arguing with the witness but he is refusing to take the witness' answers as true on a collateral subject in an attempt to impeach his own witness. The witness has already answered it, and——

The Court: The objection is overruled.

The Witness: I did not answer that in that manner.

Q. (By Mr. McCutcheon): Did a driver go to Wasilla during the month of April, 1948 and pick up something? A. To my knowledge, yes.

Q. And how much of a charge did you make for that?

A. The trip came to \$52, if I am not mistaken. As you asked me in my subpoena to bring all my records of the cab company over here, they are now loaded on the back of a ton and one-half truck and if you want them I will bring them in and you can look through them.

Q. Did you or did you not on or about the 20th day of June of this month at the Anchorage Motors

(Testimony of Frank V. Jones.)

garage, Mr. Humphries, [327] myself and other persons being present, say in substance as follows: "I charged Glen Phillips and Joe Blackard \$145 for the trip to Wasilla," did you not make that statement?

A. I did not make that statement.

Q. Did you make that statement in substance?

A. I did not make any——

Mr. Cottis: I object. It was not subject to cross-examination and was not under——

The Court: Overruled.

The Witness: I did not make any statement like that at all. If you want me to tell what I made I will tell you exactly what was made to me.

Q. (By Mr. McCutcheon): Who did you charge the \$52 charge to?

A. I did not charge no \$52 charge to no one, but the driver—the driver when he takes a car from my stand——

Q. Just a moment, were you paid for the call?

A. I have never got paid in one matter, no, in one matter, yes.

Q. Have you ever been paid for the call to Wasilla in April, 1948?

A. In April '48 that is what I am trying to get to, if you let me go back to the story I will tell you this thing and get it straight for you.

Q. Were you paid for the call to Wasilla in April, '48? [328]

A. In one way, yes, I was paid; in one way, no.

(Testimony of Frank V. Jones.)

Q. Were you paid anything for it?

A. Not in actual cash, no, I was not, I took it out in eating at Mr. Humphries' restaurant in eating for \$22 in meals I ate up there and that is how I got paid. I have been wanting to go back and tell you the straight story and you can cross-examine and you can cross-examine, if you will let me tell the story.

Q. Just a moment, now on June 20th this year at the Anchorage Motors garage, did you make any such statement to me in the presence of Mr. Humphries and other people being present?

Mr. Cottis: Same objection, Your Honor.

The Court: Overruled.

The Witness: The questions that you asked me at Anchorage Motors and the questions that Mr. Humphries asked me at Anchorage Motors, the first Mr. Humphries came in and asked me if I would come on the witness stand for him to testify that Joe Blackard put some——

Q. (By Mr. McCutcheon): Just answer the question.

A. I am answering the question; that is the only way I know how to answer it for you.

Q. At that time at the Anchorage Motors garage in response to my question "Did Mr. Humphries have anything to do with this?" did you not at that time say "No, nothing whatsoever." Did you not [329] make that answer to that question at that time and place? A. Do what, no.

(Testimony of Frank V. Jones.)

Q. In response to my question to you "Did Mr. Humphries have anything to do with this trip to Wasilla?" Did you not in substance answer "No, not whatever"?

A. I did not give you any answer at that time of the Wasilla trip.

Q. Now, in July, 1948, at my office in the presence of Mr. Humphries and myself and other persons being present, did you not say in answer to a question if Mr. Humphries had anything to do with the moose meat incident, your answer was "No, nothing at all"? Did you make that answer at that time and place?

Mr. Cottis: Same objection, Your Honor.

The Court: Overruled.

The Court: I gave you that answer in this way "So far as my knowledge, no" at that time, because I had never talked to the driver that hauled the moose meat. I had never got to see the driver.

Q. Did you know that moose meat was hauled?

A. I knew it was hauled after I had talked to you and just before I had talked to you, but I had never got to talk to my driver.

Q. Do you know where the driver delivered it? A. Yes.

Q. Do you know where the driver delivered it? [330] A. Do you want me to tell you?

Q. Yes.

A. The moose meat which was hauled from Wa-

(Testimony of Frank V. Jones.)

silla, I can't tell you the dates by memory because it has been so long, but the time that this moose meat was hauled——

Q. Just answer the question. Where was the moose meat delivered?

A. That is what I am trying to get to. I am trying to bring it back to tell you just exactly where it has been delivered.

Q. Just tell where the moose meat was delivered to Anchorage? A. 528.

Q. Whose home is at that——

A. Mr. Humphries.

Q. Where else was it delivered?

A. That is as far as I knew Mr. Humphries and the driver took it someplace else.

Q. Was some delivered to the back of the Panhandle?

A. I do not know about the back of the Panhandle.

Q. Was there someone else with the driver at the time?

A. Yes, there was a native man with the driver.

Q. Do you know from whom the moose meat was purchased?

A. It was purchased, I imagine, from this native man in Palmer—In Wasilla.

Q. Did you have occasion to visit the Panhandle in company with three other persons to eat at the Panhandle at 1:30 a.m. [331] on the 5th day of May, 1948, and at that time have a conversation with Mr. Blackard?

(Testimony of Frank V. Jones.)

A. I visit the Panhandle, I can't tell you the date, approximately that is the date, I am not for sure.

Q. What was the conversation you had with them at that time?

A. I went to the Panhandle one night, it was approximately 1:15, maybe later, maybe earlier, I can't tell you, and the door was locked at the Panhandle and I shook the door and Joe came and I says "Are you locked up for the night?" and he says "Yes, I am locked up for good," he says "the restaurant is too." And I say "What is wrong?" and he says "I will let you know later, I don't know yet." And I says "O.K." and I turned around and my other two parties and we turned around and left. We went up there to eat in the Panhandle and the restaurant part was locked and the bar.

Q. Is that all that Mr. Blackard said at that time?

A. As much as I can remember, yes.

Q. Well, during the month of July, 1948, at my office in the presence of Mr. Humphries, myself and other persons being present, did you not say as follows, in substance,—

Mr. Cottis: Your Honor, objection as leading and hearsay.

The Court: Overruled.

Q. (By Mr. McCutcheon): "When we shook the door Blackard came to the door and [332] said 'It is locked up for good. I have closed the restau-

(Testimony of Frank V. Jones.)

rant and it is going to stay closed.' '' Did you not make that statement at that time and place?

A. I probably did make that statement. He probably said it at that time. It has been a year ago. I can't repeat every word a man says.

Mr. McCutcheon: Your witness.

Cross-Examination

By Mr. Cottis:

Q. Mr. Jones, tell the story if anything has been left out?

A. Yes, there is quite a bit of the story that has been left out.

Mr. McCutcheon: I would like to have it in questions and answers so that I can object, Your Honor.

The Court: Overruled.

The Witness: I can't tell you the direct dates of all of this moose meat stuff and this stuff that has been going on. I could if I got on the back end of this truck that is sitting out here by the Court house and went through the records. It carries back since March, in approximately about the 28th, 29th or 30th of March of 1948 I got a call to send a cab to Wasilla to take a native man out of the Panhandle Cafe and Bar. They asked me if I would send one there. I wasn't at the office and the dispatcher came to send a man over to my room where I was rooming at that time and asked if it was o.k. to send a [333] cab because I do not like to have my cabs leave town without me knowing it and I said

(Testimony of Frank V. Jones.)

“Yes, go ahead and send the competence’d driver, No. 1, Wally Heffner.” So she sent Wally Heffner to pick up the native man, who was pretty well drunk, and he takes him to Wasilla and that was approximately about midnight one night. Eight o’clock in the morning came, no cab back from Wasilla. I got a little worried thinking maybe he run over a hill or slid into a bank because the snow was on the ground.

Mr. McCutcheon: If the Court please. Just a moment. Will Your Honor instruct the witness to testify what he saw and heard in connection with this case and not what other people have told him.

The Court: Confine your testimony——

Mr. Cottis: May it please the Court, the door has been wide open here on conversations and all that sort of thing. Now I am sure that the jury is confused at the moment about what has been going on and I suggest that the witness won’t be hurting anybody if he tells the whole story.

The Court: I am not trying to keep the witness from testifying but he should confine his testimony to his own knowledge. I have said that before in direct examination and I say it again. He has not departed from the rule by saying that he was alarmed because he thought that car might have gone over the bank. Of course that is not testimony but one can understand it. You may proceed. [334]

The Witness: So that following morning about

(Testimony of Frank V. Jones.)

eight o'clock, eight-fifteen, nine o'clock came, the man came back to town, and I happened to be at the L & W having breakfast. The man came in and he says "Frank, come outside in a hurry. I have got to see you," and I said "What is wrong, Wally, what is wrong, did you wreck the car?"

Mr. McCutcheon: Just a moment, if you are about to state what the man told you.

The Witness: I am about to state what I seen, not what the man told me.

Mr. McCutcheon: Very well.

The Witness: So the man says "Come out to the car." It was parked at the bus zone in front of the L & W. And he says "Frank, I have——"

Mr. McCutcheon: Now, just a moment, if the Court please I would like to have the witness instructed that he can't repeat what somebody else told him. It might be highly detrimental.

The Court: Don't repeat what somebody else told you; you can repeat what you saw and did.

The Witness: All right. Furthermore I went to the car in front of the L & W. He opened up the trunk door and said "Look in."

Mr. McCutcheon: Now, you are back to what he said again, Your Honor.

The Court: Overruled. Try to leave out of your testimony [335] what this other man said. You tell what you saw and what you did.

The Witness: So I looked in the trunk and I sees this meat and I says "Where did you get

(Testimony of Frank V. Jones.)

that?" He say "I got it at Wasilla" and the native man was with him and he says "I brought this for a native man back" and he says "I got this meat——"

Mr. McCutcheon: I object to the hearsay, if the Court please. I don't know what the witness is leading up to.

The Witness: This is something you don't know.

The Court: Overruled.

The Witness: So I got this car and I got in the car and he says "Where does Humphries live?" 538 M Street and he says "Take me." So I tell Vern what is in the car and he knows about it because the driver told me and the native man both. So he says "All right, I will meet you at my house" and I said "All right, I will go on back to your house with the cab" and we goes back to the house and he says "Follow me with his car" and we follows him out to 14th and K Street. We takes the moose meat out of my cab, puts it in the trunk of his car and he says "I will see you in one hour" to the driver and me and that was all. That was all, just the driver and me and him. One hour the driver goes back down and Mr. Humphries gives him a check for hauling the moose meat or luggage or whatever you want to call it. The man comes back to the office at noon, gives me [336] my percentage of the trip to the cab company and I takes the car down and has it cleaned up because it was already beginning to thaw in the warm part of the trunk.

(Testimony of Frank V. Jones.)

From then approximately a month or a month and one-half, maybe it was only 29 days, was this other moose meat hauled. The driver takes it to Humphries house, unloads it in the front yard, comes back and says "Vern or so and so owes me for the trip" and I said "You had better get it because I am charging you." And the driver says that Vern said "Joe is going to pay for it." Joe says "I have nothing to do with it; I know nothing about it." And I goes to talk and Joe says "If Vern don't pay you I will" and I charge it back and he pays me back in rent in his house for hauling moose meat and that is the story up to date.

Q. (By Mr. Cottis): Mr. Jones, you say that Humphries paid you for that first trip by check?

A. Yes, he did.

Q. You had occupancy of Mr. Humphries' house, did you? A. Yes, I did.

Q. Were you occupying it when a fire occurred there last fall?

A. I was there myself, yes, sleeping.

Q. Did you know whether there were any records and documents that had been left there by Humphries? [337]

A. Yes, there was records, there was documents, there was all kinds of stuff there in his house.

Q. Where were they, in what sort of containers, if any?

A. Mr. Humphries left in sort of a hurry one night and asked me if I would take him to the

(Testimony of Frank V. Jones.)

'plane. I cleaned the place up, packed the stuff away for Mr. Humphries, his records that I did not look at—I imagine they were records he had that night. We had discussed it a little bit about his home, renting it and taking care of it, and he says "Mr. Jones, if you will live here for ten days I will give you free rent for ten days" and I say—I will tell you what I told Mr. Humphries—"I will give you \$125 for the month for the place and I will take care of it" and he says "Fine."

I was looking around the house and I seen a filing cabinet and I says "Humphries, how much do you want for that?" and he says "I will sell it to you, I will take \$29 or \$30" and I say "I will buy it" and he gave me the keys and I have got it in my pocket now and the filing cabinet is in my office bought and paid for. I took the paper he had into it and put them into a cardboard box that evening and picked up all the rest of the bills that I found and checks and people's bills that he owed and put them all in a cardboard box, a box about 18 by 24 and tied it up, put it on the service porch—front service porch—with a bunch of luggage he had left and some other things. And in the house there was nothing burned of records or anything [338] to my knowledge as long as I had the house.

The house was burnt around the chimney and the floor and part of the bedroom but never any records burned or any containers of things. And I understand that I stole that stuff out of his house. I have never stole anything in my house.

(Testimony of Frank V. Jones.)

Q. You mean that the fire didn't injure anything except the chimney? A. That is right.

Q. No documents of any kind were even scorched?

A. Not that I know of, no documents nor any of his luggage was scorched.

Q. Did Joe Blackard ever owe you \$145.

A. Joe Blackard never owed me a dime as long as I know him.

Q. Does Humphries owe you any money?

A. Right at the present moment he does not. I checked back through my books with my wife and at the time I had his house she took off the account of what he owed us.

Q. What did he owe you then?

A. He owed us for that one trip and some charge accounts that his wife had of hauling the kids to and from school, and hauling him from the Panhandle home.

Q. But Blackard had never owed you any money?

A. No, sir, Blackard never owed me any money.

Q. Has Phillips owed you some money?

A. No, sir, Phillips never owed me a dime yet.

Q. Has Starns owed you some money?

A. No, I don't even know Starns. I know of him but I don't know the man in person.

Q. But you are positive that there is no debt for \$145 from Blackard to you and there never has been?

(Testimony of Frank V. Jones.)

A. There never has been. I have never had Joe's name on my books for a charge account.

Q. Well, do I gather now on this moose meat business that there were two trips to Wasilla, is that what you testified? A. That is true.

Q. And how far apart were they in time as nearly as you can remember?

A. I could not specify the correct time. I would say they are about a month apart.

Q. And roughly when was the first one?

A. Roughly the first one was sometime in March or April. It was either the last part of March or April, I couldn't tell you right off the records.

Q. And Humphries has now paid the bills for each trip? A. He certainly has.

Q. Do you know whether Marvin Campbell lived at 538 M Street?

A. No, I could not tell you that. He lives at 538 M Street.

Q. Did you have any conversations with Campbell about these moose meat deals?

A. I have never had any conversations with Campbell sitting [340] there at all, never spoken aye, yes or no to him.

Q. What was this conversation you had with Mr. Humphries and Mr. McCutcheon at Anchorage Motors June 20, 1949?

A. June 20, 1949, I was working at Anchorage Motors on a couple of automobiles and taking care of some automobiles that were having seat covers put on them. Mr. Humphries walks in the door,

(Testimony of Frank V. Jones.)

says "Mr. Jones, when you get done I want to speak to you" and I says "All right." He says "if you will go on the witness stand for me and testify," he says "I will give you \$20 now and I will give you more when I win the trial" and I say "I am not going——" ——I says "I will go on the witness stand but I am not going to testify to any lies or anything else," and he says "You are going to be subpoenaed." "Yes, when you catch up with me you can subpoena me" and they tried for about five days trying to catch me. I have been pretty busy and I am awfully busy now.

Q. This was last week? A. Yes.

Q. Will you repeat again what Mr. Humphries said about money?

A. He said if I would go on the witness stand he would pay me \$20 and when, if he won the trial, he would pay me more. And there were other people present when he said that. I am not for sure that they will get up here and swear either way because they don't want to be mixed up in the trial like I am.

Q. Was Mr. Campbell present?

A. No. [341]

Q. Was Mr. McCutcheon?

A. Mr. McCutcheon was not there at that time.

Q. Are you familiar with Mr. Humphries' reputation for being truthful?

Mr. McCutcheon: I object to that as improper, immaterial and irrelevant, outside the scope of the direct.

(Testimony of Frank V. Jones.)

Mr. Cottis: I am making the gentleman my own witness.

The Court: I think you had better do it separately.

Mr. Cottis: Very well, Your Honor. Never mind, Frank.

Q. What happened to the carton of records and the luggage?

A. As far as my knowledge the records in the house and the carton of records and luggage the time that I moved out of Mr. Humphries' home, I went to the First National Bank, turned the keys—I locked the house up. They were all on the front service porch and there were three packages in the basement. I took the keys, locked the house up and took the keys to Mr. Baker at the bank. And Mr. Humphries had given a set of keys to a real estate agent here in town and all the time that I had lived in the house I had people running in and out unlocking my doors, waking me up at nights and the mornings and finally I put some bars on the doors so that they couldn't get in. But when I moved out all the records and everything in the house, the day I left, everything was there of his records and his luggage.

Q. And when was that that you moved out?

A. Mr. Cottis, I can't tell you the exact date of when I moved out without going to the Light Company and getting my light bill that I paid up to date when I moved out.

(Testimony of Frank V. Jones.)

Q. Can you approximate it within a couple of weeks either way? For example, with respect to the fire, was it after the fire?

A. Yes, it was, it was three days after the fire happened I moved out and I left the driver there to watch the house for temporarily as the firemen asked me to notify if there was any more fires would start in the house where they would have some contact down there, and I let the driver stay there four days and four nights to watch the place until I bought this new home of mine out at 14th and East I Place and I moved him out there with me. He is still boarding with me now.

Q. That would be about October of last fall, is that correct?

A. If I am not mistaken it would be about in October about the middle, maybe a little later.

Q. And no records were damaged by that fire?

A. No, sir, there were no records, there was some stuff in the attic but no records. Here is a statement from Mr. Humphries that I had him to bring out the day he came back to town stating that anything in the house that was missing or lost or stolen was not blamed on to me, and I will give it to the Court or anyone that wants me, and I had him to give me that when I had him to come back to town. He claimed I stole some stuff out of his [343] house and I made him write it out and sign it, and, furthermore, I got a check receipt of \$90 of where I paid him.

(Testimony of Frank V. Jones.)

The Court: I think we had better suspend. Court will stand in recess until 11:17.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Mr. Jones, it was a week ago today, that is, on June 20th that Mr. Humphries offered you \$20 and more if he won this case?

A. I couldn't swear it was a week ago, but it was one day last week when I was working on some cars at Anchorage Motors.

Q. Who else was present who heard the conversation?

A. Well, I can't tell you their names, Mr. Cottis, because I don't know the persons' name. There were three people standing by and there was one clerk. They was talking about buying automobiles while they were standing there talking.

Q. Were they employees of Anchorage Motors?

A. One of them is an employee and the other—two of them was people who came in to buy automobiles.

Q. Now, did Humphries ask you to distort your testimony?

A. No, he did not ask me in them words to get up here and distort it or however you want to pronounce it but he asked me to get up here and testify that Joe did this and Joe did [344] and I said "I will be here if you can catch me and subpoena me."

(Testimony of Frank V. Jones.)

Q. What sort of things did he want you to say Joe had done?

A. Well, according to that paper——

Mr. McCutcheon: Objected to as leading.

The Court: Overruled.

The Witness: Wanted me to say that Joe ordered me up there to pick up that moose meat.

Q. (By Mr. Cottis): Is that the truth?

A. No.

Q. Joe had not ordered you up there to pick up the moose meat? A. No.

Q. What did he say, if you recall?

A. He just asked me if I would get there and testify, if I would get up and testify for his sake to win the trial.

Q. Did he go into detail at all about what you should testify to?

A. Well, they went in details of that paper right there and that is as far as they went.

Q. Was there any conversation about Joe Blackard?

A. Yes, there was a conversation about Joe, just as far as what the lawyer there read off on the paper.

Q. Will you tell us again what that conversation was as nearly as you can remember? [345]

A. I can't tell you nearly what it was, Mr. Cottis, because I wasn't paying too much attention to it, to tell you the truth. I was trying to listen to what they were saying and watching the men that I had

(Testimony of Frank V. Jones.)

working putting on seat covers up there at Anchorage Motors at that time on some automobiles that came from the Post and I was a little bit mad when I was up there because they sold me the wrong kind of stuff.

Q. Did Joe or Glen Phillips or Larry Starns, any of them, at any time ever ask you or your company to your knowledge to go get moose meat?

A. To my knowledge Mr. Starns and Mr. Blackard or Glen Phillips did not ask me in person or either to my company. The call came in like I stated, over the switchboard to my company, to pick up a native man to go to Wasilla and that is the way.

Q. A call from the Panhandle?

A. Call from the Panhandle. I am not going to swear whether it was Joe or Glen or Mr. Humphries. They can use any man on the 'phone and I cannot identify it. I don't think there is one man in a hundred that can identify a man over the 'phone and get up and swear to it.

Q. You testified that you went to the Panhandle one day and it was closed, is that right?

A. That is true.

Q. What time of day was that, do you recall?

A. Oh, I can't get it right down to the minute or approximately [346] to the hour because it has been so long but it was someplace around in midnight, around one or two-thirty, I can't tell you the correct answer to that, it was approximately in that time.

(Testimony of Frank V. Jones.)

Q. Can you remember approximately what month?

A. No, I can't, to tell you the truth, I really wouldn't. If I went back over some of this stuff and probably known that I was really coming up here, go over the records and looked it all over and thought maybe I did have to come up here and thought I would have to know, but I didn't pay much attention to it because I didn't want to get mixed up in it any more than I am right now.

Q. Did you eat at Humphries' restaurant frequently?

A. Yes, I ate at Humphries restaurant frequently when he was open and occasionally drank at the bar.

Q. Did you ever see any card games going on there?

A. No, not anytime that I was in there. I was in there at different times but I never looked around to see if they were playing cards. I seen the card tables back there.

Q. How many card tables do you recall?

A. I think there was a couple of them.

Q. Were there more than two?

A. I wouldn't swear to it.

Q. How did you come to be eating at Mr. Humphries' restaurant? [347]

A. Well, the main reason why I was eating at Mr. Humphries' restaurant, he asked me if I would come up and some of my drivers, he was in business again and he did business with us and I figured it

(Testimony of Frank V. Jones.)

was good business to trade with another business man and that is the way we got around town trying to build our business up. That is how I came to be eating in the Panhandle.

Q. Did you testify something to the effect that Humphries owed you a bill and you were running the food at the restaurant against that bill?

A. That is right, I did eat out \$22 and 45-cents, if I am not mistaken,—if I can look—I am quite sure that is just about approximately what it was—in meals and if the tickets he has got them still. Joe, the same thing, I kept them down on a piece of paper.

Q. That \$22.45, if that is correct, was that the bill occurred on one of these moose meat deals?

A. That is true, that was the last trip.

Q. Did Humphries know that you were eating that out? A. He certainly did.

Mr. Cottis: Your witness.

The Court: Any further direct examination?

Mr. McCutcheon: Yes, Your Honor.

Redirect Examination

By Mr. McCutcheon:

Q. What was the date of the last trip? [348]

A. That I cannot tell you. I would have to go back over the records and pick up the driver and go back over his cards. Like you asked me to bring the statement of records here, I have got them out here on the truck if you want to go and pick them

(Testimony of Frank V. Jones.)

up we will go down through the months and we will find them. I have got them all boxed up in a yearly report. We can and pick up and go through them and I can tell you the exact date.

Q. Now, do you remember the approximate date of the last trip—the moose meat trip?

A. No, I cannot tell you the approximate date.

Q. Now, was it the last moose meat trip that you ate a meal ticket out at the Panhandle Restaurant?

A. Yes, it was.

Q. It was for the last trip? A. Yes.

Q. Did you not in the presence of myself, Mr. Humphries and other people being present about the 20th of June, this year, approximately, did you not say in substance that you charged Blackard and Phillips \$145 for the trip and that they still owed you for it? A. I did not.

Q. You did not make such a statement?

A. I didn't not make that statement at all. I said I had charged the trip, but I did not make the statement which way I charged that statement because Joe never did call me. [349]

Q. Did you say \$145 at that time?

A. I said the trip was around one, the bill was around \$100, not the trip.

Q. What was the bill for?

A. The bill was for what Mr. Humphries owed me.

Q. What did he owe you for?

A. On cab riding and on the trip.

(Testimony of Frank V. Jones.)

Q. How much did you charge for the moose meat expedition?

A. I told you what the moose meat expedition was. It came to approximately \$51 or \$52 from the time the man was gone from the office to the time the man came back to the office with the cab.

Q. Now, how many cabs did you send to Wasilla? A. I sent two cabs to Wasilla.

Q. And how much did you charge for it?

A. It depended on how long the man was gone on the trip—the trip to Wasilla.

Q. Just answer the question.

A. The trip to Wasilla is \$45 straight up there with any cab company.

Q. Yes.

A. And it is half fare back, and on the way back on the last trip. You said not to use what was told to me. Well, this is what is told to me.

Q. I don't want any statement as to what somebody else told [350] you.

A. My driver on the other trip brought another fare with him and he was stopped at the M. P. gate and practically didn't make it through the gate with the last trip, so he charged the man who rode back with him half way from Wasilla, he picked him up at Mile Post 32 or 33 from town and brought him to town and charged him \$18.50. So it run the other trip down instead of costing more it runs less when you bring a return trip—a separate fare back. You cannot charge three different peo-

(Testimony of Frank V. Jones.)

ple one fare, you have got to charge them one fare and if you bring another fare back you have got to charge—disregard one and bring it down into the one total fare.

Q. Now did you eat up the \$52.50?

A. I did not, the Panhandle was closed. If it was open I probably would have eat it out.

Q. How much did you eat? A. \$22.

Q. You remember that?

A. It was around \$22—\$21.

Q. Mr. Humphries owes you the difference between \$21 and \$52?

A. He did, he does not. It is all paid up for bills at the house and bills at the N. C. Company which I was at his home.

Q. Didn't you have an argument with Humphries about taking some stuff out of his house?

A. I had an argument with him. [351]

Q. And didn't you bring some things back?

A. I took a big radio that was in his house and let it at Tom's Radio Shop.

Q. And you brought it back?

A. I did not bring it back.

Q. Did you still have some of the things that belong to Mr. Humphries?

A. I do not have anything that belonged to Mr. Humphries except that filing cabinet that I bought and paid for it.

Q. Didn't the United States Marshal pay you a visit with reference to some of the things you took out of this house?

(Testimony of Frank V. Jones.)

A. The United States Marshal did not pay me a visit.

Q. Didn't you take out a radio and some clock?

A. I did not.

Q. And didn't you bring it back?

A. I did not.

Q. And isn't that the time that Mr. Humphries gave you the receipt?

A. That is not the time.

Q. Now, who did you charge the \$52.52 to?

A. I charged Mr. Humphries. He is the one that the cab driver said it was charged to.

Q. Didn't you testify earlier on direct examination that you charged it to the Panhandle? [352]

A. I charged it to Mr. Humphries; I did not say the Panhandle.

Q. You didn't testify earlier that you didn't charge it to any particular person but to the Panhandle?

A. To the Panhandle—to Mr. Humphries.

Q. Charge account. Who did you charge it to?

A. Panhandle on Mr. Humphries' account.

Q. Does that show on your records?

A. It does.

Q. Can you find that entry of the records?

A. If you get right down to it I can find it.

Mr. McCutcheon: We would like to have a recess.

The Court: You had better proceed and look up the papers at the noon recess before two o'clock.

(Testimony of Frank V. Jones.)

Q. (By Mr. McCutcheon): Who was the name of the driver who hauled the moose meat in?

A. His name is Hagil. I think his last name is Hagil and his front name something else.

Q. Who drove the other car?

A. Wally Heffner.

Q. Which trip was that—the last one or one of the other trips?

A. The last trip was charged. The first trip was paid by check.

Q. When was the first trip? [353]

A. Just like I told you before, I can't tell you the correct date on it because when the cabs leave——

Q. Was it six months prior to the last trip?

A. No.

Q. Was it three months?

A. Approximately 30 days, maybe 29, maybe 25.

Q. Who hired you to go to Wasilla? Did you go to Wasilla?

A. I didn't go to Wasilla. My drivers went to Wasilla.

Q. What was your driver's name?

A. Wally Heffner the first trip.

Q. And how much did you charge for that trip?

A. Like I told you I cannot tell you right off the records. I would have to go back and look over his card, what the statement as to you and everyone else, because when a man leaves the stand at six o'clock at night.

(Testimony of Frank V. Jones.)

Q. You don't recall then, is that correct, the amount you charged for the first trip?

A. I can't recall to be right down to true dollars, no.

Q. You do recall that you charged \$52.50 for the second trip, is that correct? A. Yes.

Q. And who requested that you go—where did you get the moose meat the first trip?

A. I didn't get the moose meat.

Q. Do you know? [354]

A. No, I know it was picked up in Wasilla, you said not——

Q. Do you know that it was moose meat?

A. That is what I was told.

Q. You saw it?

A. It still had the skin on it.

Q. You testified you saw it?

A. It had skin.

Q. Do you know it was moose meat?

A. A lot has skin, I don't know it was moose meat.

Q. Why did you assume——

A. Because they told me and you said not to use what they told me.

Q. And you went along with the driver, did you, and delivered it somewhere?

A. I went along with the first trip with the driver and put it out of my cab into Mr. Humphries' trunk.

Q. When was that?

(Testimony of Frank V. Jones.)

A. I can't tell you the correct dates.

Q. Was Mr. Humphries with you at that time?

A. Yes, Mr. Humphries was.

Q. And was that the first trip or second trip?

A. That was the first trip.

Q. Where is this man that drove your cab the first trip, is he here in town?

A. Wally Heffer right now—I have got a letter from the [355] railroad for a recommendation for him to go into some lodges at some lodge. I can't keep up with everyone in town.

Q. Do you know where the driver got the moose meat the first time?

A. They told me Wasilla.

Q. Did anybody call you in connection with that trip?

A. The first trip?

Q. Yes.

A. The first trip I got the same call I got the second trip from the Panhandle Bar. They never called me, they called through the switchboard.

Q. You don't know who called the first time?

A. They called to have a man to send a cab to the Panhandle to pick up a native man. That is the story. I don't know who called, what called or how called, it got there. We took the call the same as any other call that comes through a switchboard.

Q. And you transferred the meat yourself to Mr. Humphries' car?

A. I helped transfer the meat, Mr. Humphries and the driver from my cab into his trunk of his

(Testimony of Frank V. Jones.)

car on 14th and K Streets up there on the triangle, out here on 14th and K.

Q. Now, you know it was moose meat by the appearance of it, is that correct?

A. By the appearance that loading it was moose meat. [356]

Q. What time of the night was it?

A. It was approximately ten o'clock in the morning.

Q. Did you know at that time it was unlawful to have moose meat?

A. At that time I did not know that this was moose meat that was shot out of season or anything. I didn't know what it was about. I didn't even care to know what it was about because it isn't my business looking up the law.

Q. Do you know what type of car Mr. Humphries had?

A. At that time a 1947 or '48 Mercury or Ford.

Q. Didn't you consider it a little irregular to hire you when he owned a car himself?

A. Mr. Humphries did a lot of things with cabs that he didn't do with his own car.

Q. Didn't you think it was a little irregular to be handling moose meat at that time of the night?

A. At that time of the night? It was daytime, ten o'clock in the morning. I didn't go at night. I said at ten o'clock in the morning when I loaded the moose meat out of my trunk door into his and helped the driver and Mr. Humphries, approximately ten in the morning.

(Testimony of Frank V. Jones.)

Q. Did you have any suspicions that it might have been unlawful?

A. No, I had no suspicions until after I got connected.

Q. When did you find out that there was something wrong with [357] the transaction?

A. The transactions after I found out, Mr. Humphries told me about it.

Q. When was that?

A. It was about two hours later.

Q. And then you knew it was illegal moose meat?

A. That is right.

Q. And he told you to keep your mouth——

A. He said, "Keep your mouth shut and don't let anybody know what we did."

Q. Did you keep your mouth shut?

A. Yes.

Q. You didn't report it to the police?

A. No.

Q. You hauled moose meat later on, didn't you?

A. Yes.

Q. And did you know what was going on at that time?

A. I didn't haul, my driver did.

Q. Did you report it to the police?

A. I will give you an answer to that——

Q. The question was, did you ever report it to the police?

A. Yes, it was reported to the State Highway Patrol and my cab was stopped at the M. P. Gate

(Testimony of Frank V. Jones.)

and the only reason they got by they had two passengers in it.

Q. Were you protecting the moose meat venture? [358] A. No.

Q. You say the cab driver managed to get by?

A. He got by because he had two passengers and it was reported he was coming back from Palmer with moose meat.

Q. And that was the first trip?

A. It was the second they got fouled up.

Q. Did you tell that to the police?

A. I never told.

Q. Did you know it was unlawful?

A. Yes, I knew it was unlawful but not at that time.

Q. Why didn't you report it to the police?

A. It is not my business to go around reporting stuff. Why didn't Mr. Humphries?

Q. Now, when did Mr. Humphries offer you the \$20?

A. He offered me the \$20 the morning you came up there to talk to me at Anchorage Motors.

Q. Where were you when he offered you \$20?

A. I imagine you were outside because I had talked to Mr. Humphries six or seven minutes before you walked in, approximately ten minutes.

Q. Are you sure about that?

A. Well, I am not for positive about the minutes, no.

Q. That took place before I arrived there?

(Testimony of Frank V. Jones.)

A. You must have brought him in the car because you were out to my house too at the same time. [359]

Q. That conversation took place before I arrived?

A. Just before you stepped over there to me or around me.

Q. That is the time he offered you \$20?

A. Yes.

Q. Before I got there?

A. Yes, that is true. I even stated to Mr. Humphries that I didn't want to come up here, too.

Q. When were you first subpoenaed?

A. I was first subpoenaed Saturday evening over here at the Gitchell Corner.

Q. And did you claim that that subpoena was no good? A. Yes, I did.

Q. And was that because you weren't offered your witness fees? A. No, sir.

Q. Why?

A. Mr. Humphries asked if I had change for a \$20 and I said, "No, I don't want your money and I don't want to go to the trial."

Q. The first time you were subpoenaed was when? A. That was the first time.

Q. Was there an attempt—

A. Mr. Campbell came into my cab stand with a piece of paper.

Q. What did he say?

A. He says, "Here," and I said, "You take

(Testimony of Frank V. Jones.)

that paper and go right back to the man you got it from and tell him to keep it." [360]

Q. Do you know what it was?

A. I never asked him.

Q. Did you expect it was in connection with this trial?

A. I didn't expect anything. There is a lot of people comes in that cab stand handing me paper.

Q. Did you later have your wife call Mr. Grigsby about that subpoena?

A. Not until the morning you subpoenaed her over here.

Q. Did you talk to someone with reference to that time? A. I didn't talk to no one.

Q. Just a moment, did you talk to anyone with reference to the first time you were subpoenaed?

A. I was not subpoenaed the first time. The first time was Saturday.

Mr. Cottis: If the Court please, I can't see the relevancy of all of this subpoena business.

The Court: We have gone far enough. This is just a dead end. It is a side track. What do you want to bring out? What is it that counsel desires to bring out?

Mr. McCutcheon: I appreciate that, sir, what I was trying to show was that when Mr. Humphries offered the witness a \$20 bill it was in accordance with a subpoena and that the witness on a previous occasion had claimed exemption from the subpoena on the ground that he was not offered the mileage as the law requires. [361]

(Testimony of Frank V. Jones.)

The Witness: I did not. I did not require any money at all to come up here.

The Court: Just wait until a question is asked. All right, counsel may proceed, but I think we have gone over it several times.

Mr. McCutcheon: Very well, sir.

Q. Now, you testified, did you not, that Mr. Humphries asked you to distort your testimony, is that what you testified to? A. I did not.

Q. You did not what?

A. I did not testify any such thing a little while ago.

Q. Well, I didn't mean to put words in your mouth, what did you testify with reference to that?

A. I just said that Mr. Humphries asked me if I would testify on his side to win this case and I will not testify to help anyone win this case. I am up here for the truth and nothing else but the truth. I tried to ditch this 26 times coming up here because I didn't want to get mixed up in this because you went out to my house five times trying to catch me.

The Court: Mr. Jones, you are not here to make speeches.

Q. (By Mr. McCutcheon): Then, Mr. Humphries never at any time requested you to distort your testimony in his favor, is that correct?

A. I don't know if it is correct or wrong, whatever way a man puts it to you it could be either way.

(Testimony of Frank V. Jones.)

Q. Did he ever request you to distort your testimony? [362]

A. He just asked me if I would come up and testify for his sake.

Q. What did you understand as to that?

A. There was a lot I didn't understand until I got to talking about it.

Q. Back in July, 1948, at my office in the presence of Mr. Humphries and myself and other people being present did you at that time offer any information with reference to the first moose meat deal?

A. I did not.

Q. And why not?

A. Because at that time Mr. Humphries only asked me three questions the time I walked up there to your office—three little lousy questions—and you did, too.

Q. And do you remember what those questions——

A. I gave you the answers, you got them on paper but not those same words.

Q. Did you say there were only three questions?

A. I say Humphries asked me.

Q. I asked the rest of the questions?

A. I don't know if it was you or some other lawyer, I don't recollect it. I walked up there and I was walking into a jackpot and he was going to sue me.

Q. Did you not state at that time in substance that Mr. Humphries had nothing whatever to do with it? [363]

A. Not at that time. I said, "As far as I know

(Testimony of Frank V. Jones.)

Mr. Humphries did not have anything to say about it," I said.

Q. Do you now know that he had something to do with it? A. Yes.

Q. And you didn't know at that time in July, 1948?

A. I didn't know it at that time I was talking to you, no.

Q. I thought you testified just a moment ago that Mr. Humphries told you two hours after the first moose meat deal that it was unlawful and for you to keep your mouth shut?

A. That is true.

Q. Now, which time were you lying—the first time or the second?

A. I have never lied once I got up here.

Q. Which time was it that you——

A. I have been telling the truth every damn——

Q. Now, did you ever see any card games in the Panhandle?

A. I have never seen nothing in that Panhandle.

Q. Did you ever see any pinball machines in there?

A. Yes, I have seen pinball machines and I have seen other things in there.

Q. And were there card games going on?

A. I never seen anything going on back there.

Q. Did you ever see any card games?

A. No, I never seen any men sitting there playing cards, no. I seen the tables but I never seen anyone playing. [364]

Q. Do I understand you now to say that you

(Testimony of Frank V. Jones.)

never at any time saw any card games going on in the Panhandle? A. No.

Q. How often were you in there?

A. Maybe two or three times out of a day and the night.

Q. And over what period of time?

A. Couple or two or three months.

Q. And you never at any time saw any card games in there? A. No, because I——

Q. Were you ever there in the evenings?

A. No, not in the evenings.

Q. You testified, did you not, that you didn't know Mr. Campbell? A. I did not.

Q. Did you ever see him in the Panhandle?

A. I seen him in the Panhandle.

Q. Did you testify on direct earlier that you didn't know Mr. Starns?

A. I do not know Mr. Starns.

Q. You don't know him when you see him?

A. No.

Q. You drive a cab here in town?

A. I do.

Q. Do you know where Fort Starns is?

A. I do. [365]

Q. Have you ever seen Mr. Starns before he bought Fort Starns or any other time?

(No response.)

Q. Did you ever hear of Mr. Starns?

A. I have.

(Testimony of Frank V. Jones.)

Q. You have never discussed this lawsuit with him? A. No.

Q. Have you discussed this lawsuit with anyone?

A. I have not.

Q. Have you ever talked to Mr. Cottis about it in Mr. Cottis' office?

A. I have never been in Mr. Cottis' office. I was up to Mr. Cottis' office once and that was a month ago to pay him \$1,325 and that is the only time I have been in Mr. Cottis' and Hellenthal's office in over a year.

Q. Well, congratulations.

Mr. McCutcheon: Your witness.

The Court: Any further cross-examination.

Recross-Examination

By Mr. Cottis:

Q. What was the nature of the note that you owed me, Mr. Jones? A. Mr. Cottis——

Mr. McCutcheon: Objected to as immaterial.

The Court: It was brought out on cross-examination. [366]

The Witness: The note I owed Mr. Cottis was \$1325 on a 1947 DeSota Suburban that I bought from him in 1948 and it declared I would pay him in 1949 the balance of the \$1325, as I did.

Mr. Cottis: No further questions.

Mr. McCutcheon: That is all.

The Court: Now, does counsel want any rec-

(Testimony of Frank V. Jones.)

ords? If so, it can be searched out perhaps by the witness during the noon recess.

Mr. McCutcheon: If the Court will examine him after recess, I think I have time for one short witness before noon, Your Honor.

The Court: That is what I anticipated, if you will state the papers that you want perhaps the witness will be able to find them and you will not have to take up the time of the Court in searching voluminous records.

Mr. McCutcheon: Yes, I would like to have the witness find in his records, if he can, all the entries that pertain to purchase of moose meat in the year 1948 by anyone.

The Court: Transportation of moose meat?

Mr. McCutcheon: Yes, sir.

The Witness: Your Honor, may I state this specific way, that when a man leaves the cab stand at night with a car he is charged \$6 an hour with that car from the time he comes to work until he leaves and if the man does not make \$6 an hour with [367] that car when he is on the stand sitting on these corners or sitting in the alley where we have control of him, we only charge him what he uses that car for and the records will show to my knowledge here—I haven't looked at it—but with the dispatcher whenever the car goes on charter just marks the car is on charter and it does not specifically state where that car went because you don't know.

The Court: Am I to conclude from what you say

(Testimony of Frank V. Jones.)

it would be difficult if not impossible to find it on your books the records of these trips to Wasilla?

The Witness: It wouldn't show Wasilla and it would show a charter and I can get the driver in here too if I can find him in the next twenty—I will go down and find him—the man who makes the second trip.

Mr. McCutcheon: We have the driver subpoenaed and I assume he is in the witness room.

The Witness: He is here and he can give his testimony how much it made and I think it can be straightened and I will bring his cards in from March 1st until July—from the time the man quit working for me and went to Red Cabs—and I will bring Wally's in from the first day he worked for me until the third day.

The Court: Just segregate anything that may have particular bearing on the testimony here so that we won't have to take up the time of the Court in searching a lot of cards. You [368] can put clips on those which may have reference.

The Witness: I will cut it down to the closest three days of where the trips were made.

The Court: Does counsel want the account of Mr. Jones with Mr. Humphries, any statement of that?

Mr. McCutcheon: At this time, if the Court please, I will withdraw my request. I don't believe the records will show.

The Court: All right, that is all, Mr. Jones, if

(Testimony of Frank V. Jones.)

you will return at two o'clock and have those cards available.

Mr. Cottis: Your Honor, if there are any accounts between Hy's Cabs and Mr. Humphries I should like to have them.

The Court: Very well.

The Witness: I will bring the charge account of the first day.

Mr. McCutcheon: If the witness is excused——

Juror: Did you see any of the moose meat on the second trip?

The Witness: Yes, I did.

Juror: You saw some of the moose meat on the second trip?

The Witness: On the second trip, yes, and I knew then what it was, but I am in business like everyone else and we can't—I was over the barrel—you might as well say I was over the barrel and hung before it was proven.

The Juror: You saw the moose meat?

The Witness: I saw both loads and I know what I am talking [369] about and I have not told a lie since I have been here.

The Court: That is all, Mr. Jones.

Mr. McCutcheon: Will the Bailiff call Mr. Robinson?

The Court: Mr. Robinson may be called.

HOWARD ROBINSON

called as a witness, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name please and spell your last name for the Clerk?

A. Robinson, Howard, R-o-b-i-n-s-o-n.

Q. What is the nature of your business here in Anchorage? A. I have a photo studio.

Q. And did you have occasion during the month of March, 1948, for advertising purposes to take some pictures of the Panhandle premises?

A. Yes.

Q. I hand you four pieces of paper and ask you to identify them, if you can?

A. These are photographs that I took of the Panhandle.

Q. And you took them yourself, did you?

A. Yes.

Q. And these are the prints from the original negatives, I assume? [370]

A. These are prints from the original negatives.

Q. And did you make these prints yourself?

A. No, one of my employees made them.

Q. Do those photographs represent a true likeness of the premises in March, 1948? A. Yes.

Mr. Cottis: Mr. Robinson, were these pictures all taken on the same day?

The Witness: Yes. I thought that one outside

(Testimony of Howard Robinson.)

I thought I might have got that one day but as I recall they were all taken the same day.

Mr. Cottis: Do you recall what day that was?

The Witness: I can only recall it from the standpoint it was right around the first of March, I don't know exactly the day.

Mr. Cottis: Do you know whether or not it was when the Panhandle opened?

The Witness: It was right shortly after within a short time after that.

Mr. Cottis: Were the pictures posed, Mr. Robinson?

The Witness: Not necessarily, just got up there and took them as the conditions were.

The Court: Is there objection?

Mr. Cottis: Do you know who the three children are in this picture? [371]

The Witness: No, I don't.

Mr. Cottis: I have no objection, Your Honor.

The Court: They may be admitted and marked appropriately as Plaintiff's Exhibits. I think they will be 12, 13 and 14.

Mr. McCutcheon: Under the rule they must be shown to the jury at this time, is that correct, Your Honor?

The Court: Unless the showing is waived. Does counsel waive the showing of the pictures at this time?

Mr. Cottis: I would like the jury to see them at this time. They might want to inquire further from Mr. Robinson about them.

(Testimony of Howard Robinson.)

The Court: All right, they may be shown.

Mr. McCutcheon: I would like to ask one more question of the witness.

Q. Did you see any card tables in the premises at the time you were in there? A. Yes.

Mr. McCutcheon: No further question.

Cross-Examination

By Mr. Cottis:

Q. Where were the cards and tables, Mr. Robinson?

A. I didn't say cards, I said card table, I think was the question.

Mr. McCutcheon: That was the question.

The Witness: I didn't see any cards. I saw the tables. [372] They were in the back part of the room past where the lunch counter.

Q. (By Mr. Cottis): How many of them were there? A. I can recall seeing two.

Q. You cannot recall seeing three then?

A. No, I do remember seeing two.

Q. Were there any people playing cards at those tables? A. Not while I was there.

Q. Were there any decks of cards visible on them? A. No.

Mr. Cottis: No further questions.

The Court: If the jurors have any questions to ask the witness they may ask them.

Juror: I don't have a question to ask the witness but there was some discussion about a cafe

(Testimony of Howard Robinson.)

sign being in there at the time of opening and I don't see it.

The Court: What was it?

The Juror: There was some reference to a cafe sign being taken down and I don't think——

Q. (By Mr. Cottis): Do you recall a cafe sign?

A. There is in the front, but the neon sign that was hung in the window——

Q. Do you recall anything like that, Mr. Robinson? [373]

A. No, I wouldn't probably notice it, because I don't recall.

The Court: What you saw is what appears in the pictures, is that right?

The Witness: That is right.

The Court: I think you will have to ask the question of some other witness, Mr. Gerstenfeld.

Mr. Cottis: Your Honor, would it be possible to obtain at this time some estimate of the number of witnesses which remain yet for the plaintiff?

The Court: Perhaps counsel for plaintiff can tell us.

Mr. McCutcheon: Seven.

The Court: Seven more witnesses. Well, it is obvious we will not be able to finish the case today. How many witnesses will there be for the defendant?

Mr. Cottis: I am afraid, Your Honor, there will be in the vicinity of ten and possibly more.

The Court: That is what we are here for, to try

the case. Have the jurors any questions to ask this witness?

(No response.)

The Court: If not the witness will be excused and the trial will be continued until two o'clock this afternoon. The jurors will report at two. In the meantime, ladies and gentlemen, you will observe your duty not to discuss the case among yourselves or with others and not to listen to any conversation about it and not to form or express an opinion until [374] it is finally submitted to you. The Court will be in session at 1:15, but you are to return at two and we will proceed with the trial.

(Whereupon, at twelve o'clock, noon, the trial was recessed until two p.m. the same day.)

Afternoon Session

The Court: Roll of the jury may be called.

(Jurors names were called and responded to.)

The Clerk: Jurors are all present, Your Honor.

The Court: Another witness may be called.

Mr. McCutcheon: Call Mr. Castilio.

Mr. Cottis: Your Honor, I understood that Mr. Jones was to be called at two o'clock.

The Court: I believe it would be better to have Mr. Jones return to the stand and finish up with him before proceeding with any other witness unless there is some special reason that this witness has to be heard now.

Mr. McCutcheon: Not necessarily, if Mr. Jones is available.

The Court: Is there any objection to this witness hearing what Mr. Jones has to say?

Mr. Cottis: I have none, Your Honor.

The Court: Counsel for plaintiff may examine further.

FRANK V. JONES

called as a witness, having been previously sworn, resumed the stand and testified as follows:

Redirect Examination

(Continued)

By Mr. McCutcheon:

Q. Mr. Jones, have you searched your records in pursuance to the request of the Court? [376]

A. I have.

Q. What do you find?

A. I have got the two cards of the 9th of the morning of Cab No. 3—unfinished card—and the card of April 1st, 1948.

Mr. Cottis: I didn't catch the date of the first?

The Witness: April 1st.

Mr. Cottis: What was the first?

The Witness: First one was 1948, April 1st. The second one is the 12th of April, 1948, at eight thirty in the morning when the man checked out from the stand. He never finished filling his card out at all because it was an un-paid-up.

Mr. McCutcheon: I will offer them in evidence.

The Witness: That is the way the boys take

(Testimony of Frank V. Jones.)

care of their cards when driving. The other card has not been filled out because the card was not paid for or nothing was done for it so the man was out.

Mr. Cottis: Are these what are referred to as dispatch sheets?

The Witness: Those are referred to before we were requested to carry dispatch sheets. That is our trip cards. That is what we had until 19—I will tell you the direct date of when the law came into effect that we were supposed to carry our radio log and I have got them from that day on but it don't refer to this trial at all. The radio log of radio operated license of Radio Cab, September of 1948, September 30th. That [377] is the day that we started carrying a radio log dispatcher's sheet. Before then we carried a card that the driver made out himself.

The Court: Is there objection?

The Court: They may be admitted in evidence and appropriately marked Plaintiff's Exhibits 15 and 16, I assume.

The Clerk: Yes, sir.

The Court: And may be read to the jury. What is the name of those cards? Have they any special name?

The Witness: Their names are trip cards, driver trip card, that is a card that the driver keeps himself.

The Clerk: Monday, April 1st, Your Honor, will be Plaintiff's Exhibit 15.

(Testimony of Frank V. Jones.)

The Court: Yes, will be 15.

The Clerk: And the one dated April 12th is Plaintiff's Exhibit 16.

The Court: April 12th will be Plaintiff's Exhibit 16.

Mr. McCutcheon: Plaintiff Exhibit No. 16. In the upper left-hand corner in printed words: In 15345, 8:30 p.m. Out 15478. Driver Hilgilien.

The Witness: That is the driver's name, Hilgilien. That is his correct name.

The Court: What is his name?

The Witness: I will let the attorney pronounce it because he has got the card. [378]

Mr. McCutcheon: H-i-l-g-i-l-i-e-n, not Hagil, is his correct name.

Car No. 3, date 4-12-48. From Anchorage. Time blank. To Wasilla. Time blank. Cash blank. Underneath it in the second line: Panhandle 10-c. \$1. Depot time blank. Mountain View Time blank again. Cash \$2.

Plaintiff's Exhibit 15 is a card similar to Exhibit 16. At the top of the card, left hand side: In blank. Opposite on the cord: Out blank. Driver Wally. Card No. blank. Date: April 1. From stand Time 6:55 to City Time 7:00. Cash \$1. And the next line: 967 Room F. Time 7:11 to City. Time 7:45. Cash \$3. Stand 8:07 City 8:13, \$1. Jerry 8:25 9:08, \$3. 937 8th 9:11 City 9:18 \$1. Stand 9:41 City 9:50 \$1. From blank 10:05 gas & eat 10:40. Anchorage Hotel 10:40 City 11:05 \$2.00.

(Testimony of Frank V. Jones.)

Stand 11:13 City 11:20 \$1. Stand 11:31 City 11:37 \$1. Stand 12:01 City 12:07 \$1. Stand 12:08 City 12:36 \$3.00. Stand 12:53 City 1:00 \$1. Stand 2:20 Charter 9:40 \$42. Total \$61.00 Paid \$33.55.

Q. Now, did you find anywhere in your records, Mr. Jones, where a charge was made to Mr. Humphries for a trip to Wasilla?

A. I will answer that in this manner, if you don't mind——

Q. Can you answer it yes or no?

A. It has to be answered in the way that I am going to answer it or I can't answer it for you. Is that straight enough? [379]

Q. Well, not exactly. Did you find in your records anywhere where you had made a charge to Mr. Humphries for a trip to Wasilla?

A. I am answering it right straight, just as straight as possible.

Mr. McCutcheon: I would like to have the witness answer that question yes or no.

The Court: Can you answer?

The Witness: I can answer it this way—if he can't—it has got to be brought out. On the witness stand you want the truth and nothing but the truth, let's have it. On the night of December 30, 1948, Mr. Humphries came to my office——

Mr. McCutcheon: Just a moment, I have asked a question that I believe that can be answered yes or no.

The Court: The witness says it cannot be an-

(Testimony of Frank V. Jones.)

swered yes or no. I don't know what he has in mind.

The Witness: December 30, 1948, Mr. Humphries came to my wife. She gave Mr. Humphries the credit slip, charge account.

Q. (By Mr. McCutcheon): Does that show on the record? Are you reading from the record?

A. I am giving you right straight from the shoulder.

Q. Are you giving me that information from the record? From your records?

A. I cannot give it to you because the charge account slips— [380] when the account was paid up in full Mr. Humphries got the records. I have nothing on Mr. Humphries.

The Court: Never mind, don't make any speeches.

The Witness: I answered it, Mr. Humphries has them records when he paid that account in full that night of September 30, 1948, just like he says everything else is lost.

Q. (By Mr. McCutcheon): Will you answer my original question, please?

The Court: Counsel had better restate it.

Q. (By Mr. McCutcheon): Do your records disclose anywhere where you charged a trip to Wasilla to Mr. Humphries?

A. My records do not show nothing right at the present moment because we gave all that credit account and records to Mr. Humphries. Does that answer it enough? We haven't got the record.

(Testimony of Frank V. Jones.)

The Court: Mr. Jones, please obey the admonition of the Court and don't do anything except answer the questions. You are attempting to make continual speeches here to the jury. The Court is willing to be tolerant of a witness but at the same time you have got to obey the procedure in the Court, too.

The Witness: Your Honor, I don't know how I can answer that question.

The Court: The question was whether you had any record; your answer to that is no. Then content yourself. If the [381] other counsel wishes to bring out anything he can ask you further questions.

Mr. McCutcheon: No further questions.

The Court: Does counsel for defendant care to inquire?

Further-Recross-Examination

By Mr. Cottis:

Q. Mr. Jones, were any of your records missing?

A. No, sir, none of my records were missing.

Q. Well, will you tell the Court what happened on December 30, 1948, with reference to these records?

A. December 30th, 1948, evening, possibly about six o'clock-seven thirty, Mr. Humphries came to my office and wanted to straighten up our bill—I should say, if that is straight enough—he claimed I owed him some money and I claimed I didn't. He figured on a piece of paper and I figured it and when it came to the house rent for the months I

(Testimony of Frank V. Jones.)

lived in the house and the bills I paid for him at the N. C. Company, it figured out that I did owe him, I believe, if I am not mistaken, and I am not going to state this as a bare fact, to \$90, that I gave him a check for. He writ this out himself and shown that I gave him—of all the accounts of trips that we kept on his wife, his kids, the trips we made in cabs for him, we kept it on a little pad that is in a regular charge account, and we gave him—to him. My wife stated to me the day that we gave that to him the night we straightened up this bill.

Q. May I see that bill?

A. This is the same thing we read before. He got his full bills of everything we had on him at that time. We never keep no copies when a man pays his bills he gets everything owing to him. That is, we don't have anything on the record for that account.

Mr. McCutcheon: Were you using that paper to refresh your memory?

The Witness: No, sir.

Mr. McCutcheon: May I see it?

The Witness: You may have it.

The Court: The other counsel is examining. I beg your pardon. I apologize.

Q. (By Mr. Cottis): Then, Mr. Jones, it is your normal custom, is it, that when a customer pays up a charge account all records of that account are turned over to him?

A. That is true, his account is closed out. He

(Testimony of Frank V. Jones.)

gets his full accounts. We have no records on that man after that or of any air lines when we do business with, when they pay their monthly bill we send them a statement, and all the trip cards all—we send it to them to verify their own records. The same as we did Mr. Humphries.

Q. Did you find any evidence of any payment by Mr. Humphries to Hy's Cab? [383]

A. No, sir, I did not find that payment because I went to the bank and asked them if they could give me the day that I cashed that check, and Mr. George Mumford at the bank says "I cannot give it to you." I was up there during the recess of the noon hour trying to get it.

Q. Did he state any reason why he could not give it to you?

A. He stated at that time they did not have a log. I told him the day I cashed it and he said it could—he said his account was mislaid and they couldn't tell just when it did go through.

Q. Are you certain in your memory that Mr. Humphries either by credit arising out of the house rental proposition or by check paid you for both these moose meat trips?

A. He did specifically know that he paid for both of these trips. He was told that night in the office the night before that the time up in his restaurant because the driver and me both were kicking about that money, because those cars take money to run those automobiles. On those trip cards you will see the mileage that man left town

(Testimony of Frank V. Jones.)

in the morning and when he got it back. It was not put there with my hands and if you will call the driver he will testify to it. The mileage is at the top of the card—that first card that he read off.

Q. On plaintiff's Exhibit 16, one dated April 12th?

A. April 12th, the mileage was 15,345 miles. That is when he left Anchorage. He made one trip to the depot and one to [384] Mountain View and then he went to Wasilla. His mileage when he got home that evening was 15,478 miles. Figure it out.

Q. Now, under the column entitled "From" is the word on the top line "Anchorage" and then under the column entitled "To" is the word "Wasilla" also on the top line?

A. That is right, he went to Wasilla.

Q. The next entry in the "From" column is "Panhandle" and the corresponding entry under the "To" column is "10-c." What does that indicate?

A. 10-c. He went to 10th and C. I don't know why the man went to 10th and C. He still had this native that he hauled the moose meat with in the car. They went to 10th and C for some reason and they went to the depot for some reason. That is all I know. If the man was here I think he could verify the same statement I am making.

Q. On Plaintiff's Exhibit 15, which is dated April 1, the only entry which is entitled "Charter"?

A. Charter. This trip as far as I know is cor-

(Testimony of Frank V. Jones.)

rectly—I tried to check back. You understand we carry another card like this with the dispatcher and it checks the same thing. The driver took off at 2:20 in the morning from the Green Lantern. He came to town, picked up the native at the Panhandle, I understand, and the amount came to \$42 charter the time he left until the time he got back.

Q. And that was charged to Humphries? [385]

A. The whole thing run \$61. He paid me \$33 for the trip up there—the driver.

Q. That is figured on a percentage, is it?

A. That is figured on 45 per cent.

Q. You as the owner of the cab was entitled to——?

A. 45 per cent of what the man makes. I furnish the gas, oil and the repairs on the car.

Q. And then the driver kept the remaining 55-cents? A. That is right.

Q. Has Joe Blackard ever at any time chartered a cab from you?

A. Not to my knowledge he has never chartered a cab from me.

Q. Has Glen Phillips? A. No, sir.

Q. Has Larry Starns?

A. I don't even know Larry. He has not charged a—chartered a cab from me.

Further Redirect Examination

By Mr. McCutcheon:

Q. How much did you pay Mr. Hilgilien?

A. Mr. Hilgilien has never got paid for his trip.

(Testimony of Frank V. Jones.)

Q. Do you now owe him?

A. I do not owe Mr. Hilgilien.

Q. Did Mr. Humphries pay you for both trips?

A. That is right. [386]

Q. And you didn't pay Mr. Hilgilien?

A. No.

Q. Didn't he drive the car?

A. No, sir, I do not owe Mr. Hilgilien.

Q. How come?

A. Because I did not charge Mr. Humphries the full amount for that trip. I charged him exactly what was coming to me and I told Mr. Hilgilien to get the rest from Humphries, that I was trying to get my part of it. I could not afford to have my car leave town, pay the gas. Does that answer? I am not responsible for the drivers of collecting their fares.

Q. You say Glen Phillips never chartered one of your cars?

A. Not to my knowledge Glen Phillips has not chartered one of my cabs.

Q. Has he ever hired one of your cabs for somebody else?

A. I would say yes they have hired them to take someone from the Panhandle. We have had calls to come to the Panhandle before to pick up passengers—drunks.

Q. Did Glen Phillips ever hire you to go up and get some moose meat? A. No, sir.

Q. In the month of July, 1948, at my office in the

(Testimony of Frank V. Jones.)

presence of Mr. Humphries and myself and other persons being present, didn't you say in substance as follows: "Glen Phillips called and asked if I would go to Wasilla and bring back some stuff and it later turned out to be some moose meat" did you not at that time and place say that?

A. I did not state it that way. I did not interpret it to you that way. You might have written it down that way.

Q. Did you ever receive a 'phone call from Mr. Blackard with reference to moose meat?

A. No, sir, I never received any 'phone calls from Mr. Blackard asking me to get moose meat.

Q. Did you ever receive any 'phone calls from him?

A. I have received 'phone calls but not for moose meat. I have had him call to me occasionally about a driver being up there drinking, something like that yes, same as any other bartender—bar owner.

Q. Did you in answer to a question by one of the jurors not say that you saw the moose meat the second load—the second trip?

A. I did, sir.

Q. Where was that?

A. I seen it in the back of my cab behind my cab stand on 713½ Fourth Avenue in the Richmond Bar liquor lot.

Q. Who was there?

A. The driver and the native.

(Testimony of Frank V. Jones.)

Q. And what was the driver's name?

A. Hilgilien.

Q. What was the Indian's? [388]

A. I do not know the man's name.

Q. Have you ever seen him before?

A. I seen him twice.

Q. Now did you ever have a discussion with Mr. Blackard with reference to that moose meat?

A. I did not have any discussion with Mr. Blackard over any moose meat.

Q. Do you know where the driver took the moose meat?

A. Yes, where he told me he took it, but you don't want——

Q. Do you know where he took the moose meat?

A. Where he told me he took it.

Q. What was the purpose of the cab stopping there and you looking at the moose meat?

A. The purpose was he couldn't find Mr. Humphries.

Q. You are sure about that?

A. That is right, that was what the native told me and himself, too.

Q. You are back to about what somebody else—you are pretty careful not to say a minute ago what somebody else said. All right. Now, what occasioned you to look at the meat?

A. They asked me to come out to the car.

Q. And look at the meat? A. No.

Q. Did you look at the meat?

A. Yes. [389]

(Testimony of Frank V. Jones.)

Q. Why?

A. Because I wanted to see what they had in the car.

Q. What did they have in the car?

A. A shovel.

Q. What else? A. A pick

Q. Did they have any moose meat?

A. Yes, I looked at it.

Q. Do you know moose meat?

A. Yes, it had the skin on it.

Q. What time of year was it?

A. Just as I stated right there.

Q. What time of year was it, then?

A. It was on the 12th.

Q. 12th of what?

A. It was 12th of April and it was about 4:30 or 5:00 in the afternoon.

Q. And did you know where the driver was hauling it to? A. I did not.

Q. You didn't know where he was going with it?

A. No.

Q. Do you know where he had come from?

A. Yes, I knew.

Q. Didn't you suspect something wrong about having moose meat in the car at that time of the year? [390] A. Yes.

Q. Was the meat frozen? A. Yes.

Q. Frozen solid?

A. It still had snow on it and it was dripping in the car.

(Testimony of Frank V. Jones.)

Q. Didn't you suspect something was wrong at that time? A. I suspected it a little.

A. I suspected it a little.

Q. You knew there was something wrong?

A. I didn't know; I suspected but I didn't know for sure.

Q. Did you make any attempt to find out if anything was wrong?

A. I did, I asked the M.P.'s at the gate.

Q. What did the M.P.'s tell you?

A. They said they were going to stop a Hy's Cab for hauling moose meat.

Q. And what did you tell them?

A. Go ahead, I am behind you.

Q. When you found out there was moose meat did you tell the M.P.'s? A. I did not.

Q. Did you tell Holger Larsen?

A. I discussed it with the sergeant on the Post.

Q. What is his name?

A. I do not know, and he said "If I ever catch them going through the military reservation I will get them." [391]

Q. And you were behind that?

A. I told the driver, Hilgilien, to never do it again.

Q. Did you tell him the first time?

A. I didn't know Hilgilien was going off.

Q. Was this the first or second?

A. It was his first trip and Wasilla trips.

Q. He did it again? A. No.

(Testimony of Frank V. Jones.)

Q. How many trips were there?

A. There were two trips and two drivers.

Q. You did—did you attempt to head off the second trip? A. I didn't know about it.

Q. You charged Mr. Humphries for it?

A. That was after it was done.

Q. Did you tell any policemen?

A. I never talked to any policemen, I told you the first time.

Q. Now, did you later have a discussion with Glen Phillips? By "later" I mean within the next few days, about this moose meat deal?

Mr. Cottis: The question isn't clear to me.

Mr. McCutcheon: I will restate it.

Q. In the past several weeks, Mr. Jones, have you had occasion to talk with Mr. Phillips—Mr. Glen Phillips—with reference to hauling moose meat for somebody? [392]

A. I had talked to Mr. Phillips but we never, as far as I know, discussed moose meat, no.

Q. Did you talk to him about this case?

A. He discussed it to me about—how was it—I can't repeat the words—he said "Well, I guess they got you, too. I am going up, too" and I said "They haven't got me because they haven't caught me."

Q. When was that?

A. That was the same night you were out to my house about midnight.

Q. You did see Mr. Phillips? A. Yes.

Q. You did discuss this case?

A. I admitted once I didn't discuss the case.

(Testimony of Frank V. Jones.)

He said "I guess they got you" and I just walked on.

Q. Where was this conversation?

A. I was walking down the street, I think, between here and the Smart Shop. I was——

Mr. Cottis: Your Honor, I fail to see the relevancy and I object.

Mr. McCutcheon: I think the witness is lying, your Honor.

The Court: Now, wait, wait, that is out of order, counselor.

Mr. McCutcheon: I apologize.

The Court: Jury will disregard the statement of counsel [393] and upon argument counsel may within limits, of course, state their views. But in cross-examination of a witness it isn't fair nor in the direct examination.

Mr. McCutcheon: Your Honor, I feel that the witness is testifying falsely.

The Court: That is out of order too.

Mr. McCutcheon: Well, then, your Honor, I feel that the witness has at some other time made statements inconsistent with his present testimony.

The Court: That is very well; you haven't been stopped as to inquiring about that.

Q. (By Mr. McCutcheon): Now, do you recall when Glen Phillips called the cab stand? Did you say that you had a dispatcher that took the call?

Mr. Cottis: There is no evidence that Mr. Phillips called the cab stand.

The Court: He——

(Testimony of Frank V. Jones.)

Mr. McCutcheon: He testified to it.

The Court: You may ask him if he testified to it but it isn't proper to assert as a fact that he did so testify.

Q. (By Mr. McCutcheon): Did you not testify that your dispatcher took a call from Glen Phillips?

A. I did not specifically state that Glen Phillips called. I said I could not identify it and I don't think the dispatcher [394] can. The call came through a switchboard. At this time I have no switchboard, I have nothing but straight 'phones.

Q. Then in July, 1948, when you told me that Glen Phillips called you that was incorrect, wasn't it?

A. I told you in this matter the day I was at your office and Mr. Humphries was with you and I forget who else. I think—I don't know who else was there.

Q. Did you not at that time and place——

Mr. Cottis: Your Honor, I ask that the witness be permitted to answer these questions.

The Court: The witness was——

Mr. McCutcheon: He makes a speech.

The Court: No, not always, occasionally he does. Have you finished?

The Witness: He don't want me to make a speech.

The Court: Just answer the question.

The Witness: No.

Q. (By Mr. McCutcheon): No, what?

(No response.)

(Testimony of Frank V. Jones.)

Q. You didn't at that time say in substance in my office in July of 1948, say that Glen Phillips called you and asked you to go to Wasilla and bring back some stuff and it later turned out to be moose meat? You mean you didn't say that?

A. I didn't say it to you in those words—in the words you [395] are reading off in that paper.

Mr. Cottis: Your Honor, the witness has denied that several times and I object, it is a method of trying to impress the jury. It is in the record three times.

The Court: It has been gone over so often that the Court must preclude any further examination as to that particular question.

Mr. McCutcheon: Very well, sir. No further questions.

The Court: Any further cross-examination.

Further Recross-Examination

By Mr. Cottis:

Q. Is there any part of your testimony that you just gave that you want to explain or elaborate on?

A. Yes, there is, Mr. Cottis, I would like to explain one item.

Q. Go ahead.

A. The day I walked up into this gentleman's office with Mr. Humphries I said about half a dozen words and Mr. Humphries said the words and just the statement that he read Mr. Humphries spoke out of his own mouth—no, not in that way. I have

(Testimony of Frank V. Jones.)

got a switchboard and I don't know for sure where the call came from. I can't specifically say who gave it to me but they said their name was Glen Phillips, and I cannot prove that on the witness stand to anyone.

Q. Did Mr. Humphries at that time make you any offer of any [396] money to testify?

A. No, sir, he did not.

Q. When did you take possession of his house?

A. I cannot tell you the correct date, Mr. Cottis, at all because I don't specifically know just what day I did move in there or what month but it was right at the time I got Mr. Humphries out on the sly at midnight at night on a plane. He was sneaking out of town, wanted me to get him out and I got him out.

Q. Wasn't that prior to July, 1948?

A. I believe it was, sir.

Q. Actually was Humphries in town at all during July of 1948 that you know?

A. I couldn't swear to that at all.

Q. Are you sure that Humphries was present at this conference that Mr. McCutcheon talks about in July of 1948?

A. In his office?

Q. Yes. You are sure Mr. Humphries was present?

A. Yes, he was present.

Mr. Cottis: No further questions.

The Court: That is all.

Juror: Mr, Jones, did you say you saw the second load of moose meat unloaded from your car?

(Testimony of Frank V. Jones.)

The Witness: I did.

Juror: Did you tell where it was? [397]

The Witness: If I may answer it this way, I could tell you exactly. This is it. I am not making any speeches to help myself or anyone else but I don't know how to bring the stuff out any other way. The man took the moose meat and he asked me where Mr. Humphries or Joe Blackard and I said "Go find either one of these and get rid of it and don't do it again." So I took another cab and followed him and he went straight with this native to Mr. Humphries' house and unloaded on the back porch on a cement porch out there and left it, as far as my knowledge, because I drove away when I seen what he was doing. I drove back to the cab stand and the man came back to the cab stand about two hours later.

The Court: Any other juror have a question?

Juror: Did you say you were looking for either Mr. Humphries——?

The Witness: The driver was looking for either one of them. This native man, as I understood, wanted one of them and he wanted Humphries or Joe. The driver wanted one of them to pay him. He didn't care who paid him as long as he got the money.

Juror: In other words you found Humphries instead of Blackard?

The Witness: No, no, I don't want you to get it that way. No, I didn't find——

Juror: The driver—— [398]

(Testimony of Frank V. Jones.)

The Witness: No, the driver knew where Humphries lived. He had took Humphries home different times from the Panhandle and from the cafe. He used to run down here at the railroad.

Juror: Wasn't Mr. Humphries the receiver? Was Mr. Humphries there to receive it?

The Witness: That I cannot say because I don't know. I do know that Mr. Humphries knowed that the stuff was coming in. It is nothing to be ashamed of. I am up here to tell the truth and nothing but the truth and Mr. Humphries asked me to come up here to come up being on his side. I am not on Joe Blackards or Humphries. I am not. I dodged this for nine or ten times being subpoenaed. I didn't want to come up here and get——

Juror: But Mr. Blackard also knew it was coming in as well as Mr. Humphries?

The Witness: No, I later asked the driver and if the driver was here he could tell you whatever he knew, I can't.

Juror: Was anybody in the house when you left it—at Mr. Humphries' house?

The Witness: That I do not know. I didn't get out of my cab to find out. I came back to my stand and had a pretty good——

Juror: First time was loaded directly into Mr. Humphries' car?

The Witness: Yes, I deliberately loaded it into his car [399] and Mr. Humphries helped and he brought a little piece of canvas along to cover it up.

(Testimony of Frank V. Jones.)

He loaded it in his car and took it to a locker or some place, I don't know. The first time that Mr. Humphries went into Court about moose meat they never did come. In fact I shut up. In cab business you are in a bad business anyhow.

Mr. McCutcheon: May I examine the witness a little bit further in view of his last statement, Your Honor?

The Court: Very well, counsel, you may proceed.

Further Redirect Examination

By Mr. McCutcheon:

Q. You said that when Mr. Humphries was arrested nobody came around to see you?

(No response.)

Q. Well, I talked to you.

The Court: It isn't sufficient to shake your head. What is your answer to that?

The Witness: To my knowledge no one came to see me, no.

Q. (By Mr. McCutcheon): Didn't I come to see you, Mr. Jones?

A. If you did, you did not talk to me.

Q. Didn't you recall our conversation in July, 1948, immediately after Mr. Humphries' arrest?

A. No.

Mr. Cottis: I object, the record clearly shows that that [400] moose meat thing was in April. Now counsel is misleading the witness.

(Testimony of Frank V. Jones.)

Mr. McCutcheon: Well, I didn't mean to.

Mr. Cottis: Well, I have a certified copy of the conviction if you would like to refresh your memory.

Mr. McCutcheon: No, we recall it well now.

Q. Now, do you recall, Mr. Jones, my talking to you about this moose meat incident?

A. If you talked——

The Court: When?

Mr. McCutcheon: July, 1948, at my office in the presence of Mr. Humphries and myself and other persons being present?

A. I do not remember anything that you asked me, if you did. I don't remember even visiting you at that time at your office, if I did. There is a lot of things that I get around to seeing and I can't remember everything that goes on. I am no master-mind, mechanical man.

Q. Now, were you visited by Mr. Holger Larsen of the Fish and Wildlife Service about this incident?

A. I was not. I just checked up. Didn't you state earlier in the—state here a little earlier when you were cross-examined that I was served with a subpoena or warrant over my arrest before, if you check in the office out there you can't find any.

The Court: Don't ask counsel any questions. He is not able to answer any questions you ask him.

Mr. McCutcheon: I certainly couldn't answer that one.

Q. Now, Mr. Jones, didn't you testify here a

(Testimony of Frank V. Jones.)

little bit earlier in the trial when I asked you if you knew where the moose meat went, didn't you say that "I don't want to answer that because somebody else told me"?

A. I said on one load not both loads.

Q. I should have asked you about the second load, is that correct?

A. We were talking about the second load not the first load.

The Court: That is all, Mr. Jones, you may step down.

Mr. McCutcheon: Call Mr. Jack Castlio.

JACK CASTLIO

called as a witness, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. State your name and spell it for the Clerk, please?

A. My name is Jack Castlio.

Q. And you are in business here in Anchorage, are you? A. Yes.

Q. What is the nature of your business?

A. I am an executive in a wholesale grocery firm.

Q. Calling your attention to the months of May and June of 1948, did you have at that time an occasion to take an inventory of the supplies at the Panhandle Restaurant? [402]

(Testimony of Jack Castlio.)

A. I recall it being about that time when I was asked to take an inventory of the restaurant supplies there.

Q. And at whose request did you take that inventory?
A. Mr. Joe Blackard's.

Q. And the amount of the inventory was how much—the value of it?

A. To the best of my knowledge it was about \$400.

Q. It was more than that?

A. No more than about \$400.

Q. How many days after the restaurant closed did you take this inventory, approximately?

A. I wasn't aware of the exact day the restaurant closed because of the confusion about the place. I believe it was a week or possibly ten days after the restaurant closed.

Q. And were the store-rooms locked?

A. There was a lock on one door that we went through.

Q. Who had the key to the lock at that time?

A. Man by the name of Jack Guard, who was chef.

Q. Who was that man?

A. He was a chef who was going to operate the restaurant when and if it opened again.

Q. And he had the keys to the storeroom, is that correct?
A. As I recall it, that is correct.

Q. And the storeroom revealed an inventory of only \$400, is that correct? [403]

(Testimony of Jack Castlio.)

A. The inventory was included in about three different rooms.

Q. But the total sum of the inventories was in the neighborhood of \$400 more or less?

A. That is right.

Mr. McCutcheon: Your witness.

Cross-Examination

By Mr. Cottis:

Q. Mr. Castlio, have you been in the grocery business for sometime?

A. Yes, several years.

Q. Were you familiar with Humphries' operation of this restaurant?

A. Yes, we did business with him most of the time that he was in there. That is, our firm did business with him for a few months.

Q. Considering your experience with Mr. Humphries and the operation of that restaurant, is it your opinion that \$400 is about the average inventory that he carried? A. Yes.

Mr. McCutcheon: We object to that, if the Court please.

Mr. Cottis: What grounds?

Mr. McCutcheon: On the grounds it is outside the scope of the direct examination, for one thing, and, two, it is irrelevant and incompetent. I don't see how possibly the witness could answer that question. [404]

The Court: He can answer if he has the knowl-

(Testimony of Jack Castlio.)

edge. He hasn't shown himself qualified to answer yet.

Q. (By Mr. Cottis): Where have you been in the grocery business, Mr. Castlio?

The Court: I don't mean about his general qualifications but he hasn't shown that he was familiar with the inventory from day to day or week to week.

Q. (By Mr. Cottis): Mr. Humphries was a customer of yours, was he? A. Yes.

Q. Were you there frequently? A. Yes.

Q. Were you familiar with the general type and quantity of inventory that he carried?

A. Yes.

Q. And what is your opinion as to its average daily running value?

A. I would say that between four and six hundred dollars is about average on the type of merchandise I inventoried.

Q. And what type of merchandise was that?

A. What we call dry line, that is exclusive of butter, eggs and meat.

Q. And when you state that the inventory when you took inventory was approximately \$400 was that on the dry line alone?

A. Yes, non-perishables. [405]

Q. Do you have any opinion as to the value of the perishables? A. No, I do not.

Q. Did you ever at any time see an inventory in Mr. Humphries' custody that approached \$4,000?

A. No.

(Testimony of Jack Castlio.)

Q. Does Mr. Humphries owe you or your firm any money? A. No.

Q. Did he in April of 1948?

A. I am not sure of my dates. He owed us a bill, a running bill, during the time that he was in business, a small bill.

Q. Did you ever try to collect that bill from him?

A. We collected quite regularly.

Q. Did you have any trouble collecting it ever?

A. Yes, at the end.

Mr. McCutcheon: What was the answer to that question?

The Witness: At the end it was very difficult to effect a collection. I mean toward the latter part of his operation.

Q. (By Mr. Cottis): Will you describe what experience, if any, you had in attempting to collect it?

A. I had to make several trips to the place of business each time I wanted to collect. I believe we had the account on a weekly basis. The last week or two my reception was very irate.

Q. That is, your reception by Mr. Humphries?

A. Yes.

Q. Were there any outward evidence of his irateness?

A. Yes, I was physically threatened.

Q. By whom? A. Mr. Humphries.

Q. What kind of threat?

A. Getting up from the seat alongside of me

(Testimony of Jack Castlio.)

where we had been talking about it "I am going behind the counter and coming back out with the handle of a hammer."

Q. Did he have a hammer?

A. The handle of a hammer which was clattered onto the counter.

Q. Was he threatening you with the hammer?

A. I presume that is what he had in mind. He didn't say that he was.

Q. What did you do, did you stay there?

A. Until I considered the discussion as being fruitless to continue, a few moments.

Q. So you left, did you?

A. That is correct.

Q. Were you frightened?

A. I don't think so. It all depends on what you mean by "fright."

Q. Now, at the time you took this inventory after the restaurant had been closed, do you know how it came to be closed? [407]

A. I didn't understand the question?

Q. At the time you took this inventory in May, 1948, the restaurant was closed, was it not?

A. Yes.

Q. Do you know how it came to be closed?

A. No.

Q. Was there any meat around at the time you took the inventory?

A. There were a few pieces of meat and fish. However, there were very small pieces and were obviously refuse.

(Testimony of Jack Castlio.)

Q. Were there any eggs or milk around?

A. I don't recall any eggs or fresh milk.

Q. Were there any fresh fruits or vegetables?

A. Not that I recall.

Q. How did you get into the storeroom?

A. Got into one storeroom, passed through the door behind Mr. Jack Guard and I am quite sure he had a key with which he unlocked the door to that room, and then there was another smaller room on that same floor and a basement compartment.

Q. How did you get into the basement?

A. If I recall we went down the coal chute.

Q. Did you experience any difficulty in getting down there?

A. It wasn't easy but it wasn't exactly difficult.

Q. Did you testify that Joe Blackard asked you to take this inventory? [408]

A. I believe he did.

Q. Did he volunteer any explanation to you as to why he wanted the inventory?

A. Not that I especially recall, either he said so or I got the impression that he wanted the opinion or authority from someone that was familiar with the merchandise to say what the value of the stock there was. Now he may have given that as an explanation for the request. I didn't pay a great deal of attention to it.

Q. Did Humphries owe you some money at the time you took the inventory?

A. I believe he did.

(Testimony of Jack Castlio.)

Q. Did Blackard ask you to take any portion of the inventory to satisfy that bill?

A. I don't recall how that was handled. I was under the impression that Jack Guard paid me the amount of the bill. I mean, checking our ledger the account shows paid and that is——

Q. That is your best recollection?

A. That is my best recollection.

Q. Mr. Castlio, you were subpoenaed to come here? A. Yes.

Q. Were you paid any money at the time this subpoena was served on you? A. No.

Mr. Cottis: No further questions. [409]

Redirect Examination

By Mr. McCutcheon:

Q. Who subpoenaed you, Mr. Castlio?

A. Joe Blackard handed me the subpoena.

Q. Now, at the time you took the inventory did you make any charge for that service?

A. No, I did not.

Q. You hoped to do business in the future with the new restaurant owner, didn't you?

A. That is correct.

Q. And with Mr. Blackard?

A. He was an account of ours too at the time.

Q. He had been for a period of time, hadn't he?

A. Yes, at the bar.

Q. You were friendly with him, were you not, during the period of time that he was in business?

(Testimony of Jack Castlio.)

A. That is correct.

Q. Had you been in Mr. Humphries' storeroom before? A. Yes.

Q. On several occasions?

A. I wouldn't say several, few.

Q. On one or two occasions?

A. I believe so.

Q. And was that in the early part of his operation or the latter part? [410]

A. I believe it was in the early part of his operations.

Q. And what did you find at that time in the storeroom in the early part of his operations or do you recall?

A. I don't specifically recall, nothing unusual that I wouldn't expect to find.

Q. Do you know who Mr. Humphries did the bulk of his business, with you in purchasing groceries or with someone else?

A. I am quite sure he did not do the bulk of it with us.

Q. It wouldn't surprise you to know that he made a thousand dollar purchase from Jack Barrett would it? A. No.

Mr. Cottis: Your Honor, I object to that question.

The Court: Overruled.

Q. (By Mr. McCutcheon): That wouldn't surprise you, Mr. Castlio? A. No.

(Testimony of Jack Castlio.)

Q. Now, is it possible that he carried a larger inventory and you didn't know about it?

A. Yes.

Q. That is possible? A. Certainly.

Mr. McCutcheon: No further questions.

Recross-Examination

By Mr. Cottis:

Q. Is it possible that he carried a larger inventory at the [411] Panhandle and you didn't know about it?

A. It is possible, of course, Mr. Cottis, but it is highly improbable.

Mr. Cottis: No further questions.

Further Redirect Examination

By Mr. McCutcheon:

Q. Did you ever have occasion to go out to his house to check his inventory there?

A. No, sir.

Mr. McCutcheon: That is all.

The Court: Do the jurors have any question?

Juror: Yes. Is it permissible for him to use that chart and show us how he got down in that basement?

The Court: Yes.

Further Recross-Examination

By Mr. Cottis:

Q. Mr. Castlio, could you come down here?

(Testimony of Jack Castlio.)

The Court: And interpret the chart.

Juror: Yes.

Q. (By Mr. Cottis): This might not be quite in proportion, Mr. Castlio, but if I may take the liberty, this was meant to represent the bar and this was the small storeroom and this would be the men's and women's rooms or the reverse. This I don't recall what it was. These supposedly are three card tables. There was some [412] evidence that there were two.

This is the restaurant portion and this is a room that is 16 or 18 feet long, according to Mr. Humphries' testimony and had a refrigerator or icebox—a reach-in icebox in it.

These are chairs and this, of course, is the entrance up here and this is Starns Liquor Store.

Now, I believe that one of the storerooms was in the basement and I think that is the one that the juror has in mind that she would like to know how you got into that, on this sketch.

A. You understand I am not familiar with the Panhandle for sometime and on many occasions I have gone into the storeroom. The particular day in question I am sorry to say I declined to see exactly how I got in there but as I recall it we went out the rear door, which I don't see indicated here, which went outdoors. There was a coal chute, I would say, about here, a large coal chute and I believe we went down there. I have gone down there several times, generally because the door of this

(Testimony of Jack Castlio.)

storeroom would be locked and the key not immediately available.

There is a trap door in this storeroom which lets down into these two small storerooms down here which are connected. I believe that on this day Mr. Guard and I went down through the coal chute to go in there to inventory the merchandise.

Q. (By the Juror): Do you mean to say you have gone down that coal chute [413] more than once?

The Witness: Yes. This door would be locked about one morning out of each week and in order to get an order and to find out what merchandise was on hand, generally I was allowed to inspect the stock alone. This was prior to the time that Mr. Humphries was operating it.

Q. (By Mr. Cottis): Prior to that time?

A. Yes.

Q. You would use the coal chute as an entrance-way to get down? A. That is correct.

Q. In other words it was large enough that a man could crawl up and down it?

A. Oh, yes.

Juror: How come you went down it more than once?

The Witness: I just explained, in order to inventory the stock on different occasions to see what would be necessary for the day's order. There were only two ways to get there—through this storeroom door and through a trap door; if this door was

(Testimony of Jack Castlio.)

locked and the key not available on the premises I would go down through the chute and inventory the merchandise.

Juror: Isn't it unusual for you to tell the restaurant man what he needs? Don't the restaurant man usually place their own order? [414]

The Witness: I tell him what he has on hand and what I think is needed.

Juror: Is that the way it is generally done?

The Witness: With me. I don't know how the other people do.

Juror: You mean the restaurant man wouldn't know what he needs?

The Witness: If he took the time off of the range right at that minute he could find it out, too, but I would do it for him, yes.

Juror: Before Mr.—

The Witness: I don't recall having gone through the chute while Mr. Humphries was there; in fact, I can't say that I specifically recall having gone into this basement while he was there. I have been in there over a hundred times and whether it was during that time or not I couldn't swear it.

Juror: When you took that inventory you inventoried what was up and down both times, about \$400?

The Witness: Yes, that is right.

The Court: That is all. Has counsel any further questions to ask?

(No response.)

The Court: Court will stand in recess until 15 minutes past 3:00.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. McCutcheon: Call R. E. Hilgilien.

Bailiff: He is not in the witness room.

Mr. McCutcheon: If the Court please, on the 21st day of June, 1949, I served R. E. Hilgilien at Red's Cab with a subpoena and at that time offered him the mileage as required by law and a day's attendance as a witness. I had some difficulty and the witness is absent at this time, your Honor, and I at this time move the Court for a bench warrant for his arrest.

The Court: Bench warrant may issue.

Mr. Cottis: May I see the return of service on that, your Honor?

The Court: Yes.

The Clerk: May I inquire of counsel where this witness may be found?

The Court: Yes, where may the witness be found?

Mr. McCutcheon: Well, I suggest, your Honor that the Marshal inquire at Red's Cab Stand.

The Court: Has the subpoena and the return thereto been filed?

Mr. McCutcheon: The return will be filed at this time. Counsel has asked to see the return.

Mr. Cottis: Of course I have no objection to the

witness but the return seems seriously defective.

The Court: Let me see the paper.

Mr. McCutcheon: If the return is in any way defective I shall be pleased to amend it. If counsel wishes to examine me under oath I shall be pleased to take the witness stand in connection with the serving of this subpoena.

The Court: Under our law is a private person permitted to serve a subpoena?

Mr. McCutcheon: I think so.

The Court: Must there not be a return by affidavit? I think the return is absolutely insufficient.

Mr. McCutcheon: If the Court please, I shall be glad to testify under oath at this time.

The Court: The return itself—the testimony under oath doesn't take the place of a proper return. I think there must be an affidavit showing that the—an affidavit by the person who served the subpoena showing the service of the subpoena and the time and place.

Mr. McCutcheon: Very well, sir, at the next recess.

The Court: And also the tender of the witness fees. The order for issuance of a bench warrant will not issue until such return is made.

Mr. McCutcheon: I shall prepare such return at the next recess.

The Court: Counsel may take the paper and have it available so that a proper return can be made to it. [417]

No. 12503

United States
Court of Appeals
For the Ninth Circuit.

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 433 to 872)

Appeal from the District Court
for the Territory of Alaska
Third Division

FILED

AUG 4 - 1950

PAUL P. O'BRIEN,

CLERK

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Mr. McCutcheon: Call Dorothy Cavin.

DOROTHY CAVIN

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you kindly state your name, Mrs. Cavin and spell your name for the Clerk.

A. Cavin, C-a-v-i-n, Dorothy.

Q. Do you live here in Anchorage?

A. Yes, I do.

Q. During the year, 1948, did you have the restaurant business in the Panhandle Cafe?

A. Yes, I did.

Q. And what months?

A. Well, we started out in August 1st to December 21st when it burned down.

Q. I hand you an article and ask you to tell me what it is?

A. This is my book that I had for the restaurant.

Q. From whom did you purchase the restaurant business?

A. Well, the way we did it, it was from Joe Blackard and Glen Phillips.

Q. Had you known Joe Blackard for a period of time?

A. We used to go in there and have a few drinks in the evening when we first came to town. We got to going in there and [418] they treated us nice

(Testimony of Dorothy Cavin.)

so we used to go in there and drink with them and visit.

Q. You became friendly with Mr. Blackard, did you not?

A. Yes, we did later on. Yes, we did.

Q. And that friendship still exists, does it not?

A. They have never ever done anything to us in a way we shouldn't be friends.

Q. And you were subpoenaed by the plaintiff, Mr. Humphries, to appear here, were you not?

A. That is right.

Q. Now, at the time you took over the restaurant business, Mrs. Cavin, what articles of equipment did you receive?

A. Well, everything that was in the restaurant, that is, the stove and the dishes and those saws and everything that was there we used it.

Q. Did you purchase the business or lease it or how?

A. No, we didn't, we didn't have no lease or anything. We worked on a 10 per cent basis.

Q. And who received the 10 per cent?

A. Well, we used to give it to Glen every day.

Q. Give it to who?

A. Glen Phillips. Every morning we paid the percentage on it.

Q. You gave him 10 per cent of the gross receipts, did you? A. That is right. [419]

Q. And the balance was yours?

A. That is right.

(Testimony of Dorothy Cavin.)

Q. Well, you were more or less in business with them, is that right?

A. No, we weren't; we just went in there and worked for ourselves and we just paid them the 10 per cent.

Q. Well, the 10 per cent was for rent, was it?

A. Evidently that is what it was. We used to give them just 10 per cent. We didn't know what they did with it.

Q. That was in lieu of rent?

Mr. Cottis: I object, Mr. McCutcheon is putting words in this witness' mouth. She hasn't said anything about rent. I object further on grounds what the relationship was between Blackard and Phillips and Mrs. Cavin as completely irrelevant to the issues of this case.

Mr. McCutcheon: It is preliminary, sir. I hope to show——

The Court: The objection is overruled on the last grounds stated because it may be preliminary, but counsel should avoid leading the witness.

Q. (By Mr. McCutcheon): Have we ever discussed the facts that you are now testifying to, Mrs. Cavin?

A. I didn't understand what you mean by that?

Q. Have I ever discussed with you the facts that you are now testifying to? [420]

A. What I am testifying against?

Q. No, you misunderstood. Have we ever previously discussed between you and I the facts that

(Testimony of Dorothy Cavin.)

you are now testifying to? A. No.

Mr. Cottis: Your Honor, I object to that. It is not proper examination on a direct examination.

The Court: Overruled, you may answer.

Q. (By Mr. McCutcheon): Now, was the 10 per cent—I will withdraw that. Did you pay rent, Mrs. Cavin?

A. No, that wasn't rent. I wouldn't say it was rent, it was on a 10 per cent basis we worked it and what they used to do with that was to pay our oil and anything that went wrong with the Frigidaires they paid out of that and the lights they paid.

Q. Did they pay the fuel for your ranges?

A. Absolutely, they paid it all.

Q. And all the electricity?

A. Everything. And if anything went wrong with the Frigidaires they paid it.

Q. And did you pay anything for the privilege of going in business there?

A. No, we didn't. That is all. I paid for all the groceries I got from Frozen Supply and I paid cash for that.

Q. Was there any inventory when you took over?

A. There wasn't anything. There was about one case of sauerkraut [421] in the basement and that is all.

Q. Who had operated the restaurant just prior to you? A. Before me?

Q. Yes, Ma'am.

(Testimony of Dorothy Cavin.)

A. I believe it was Jack Carr or Jack Guard, I don't recall his exact name.

Q. Do you know how long he had operated the restaurant?

A. I know he wasn't in there very long. It couldn't have been more than four or five weeks at the most.

Q. But there was no inventory whatsoever of consumable supplies when you took over?

A. Nothing, just about one case of sauerkraut, as I remember, and I never used it at all, still in the basement.

Q. Did you have the keys to the storeroom?

A. Yes, I did.

Q. Who gave you the keys to the storeroom?

A. The way it was there was no keys on that storeroom, because we had to buy padlocks, because once in a while we had quite a bit of meat in the back and we thought something would be missing so we bought the padlocks ourselves and put it on there.

Q. With whom did you do business and whom did you purchase your supplies from for the restaurant?

A. We used to get most of our stuff from Alaska Merchandise.

Q. That is Mr. Castlio's, is that right? [422]

A. Jack is all I know him by.

Q. Do you recall the value of your inventory?

A. No, I don't.

(Testimony of Dorothy Cavin.)

Q. Would you carry \$500 worth of supplies on hand?

Mr. Cottis: I object, Your Honor, to these leading questions and I don't see the relevance.

The Court: Objection is sustained on both grounds.

Q. (By Mr. McCutcheon): Did you carry an inventory, Mrs. Cavin?

A. No, I didn't, I never did take inventory after I was in there.

Q. Were you in the premises, that is, were you in business in the premises when it burned?

A. Yes, I was.

Q. Do you have any idea of the value of your inventory at the time of the fire?

Mr. Cottis: Your Honor, I object on grounds of relevancy.

Q. (By Mr. McCutcheon): Can you tell me what items of equipment you used in connection with the restaurant business?

Mr. Cottis: Same objection.

The Court: Overruled.

Q. (By Mr. McCutcheon): Mrs. Cavin, could you tell me what items of restaurant equipment you used while you were in business there? [423]

A. Well, I used everything that was there, all the dishes and we used the saws, the meat grinder.

Q. Dishes? A. That is right.

Q. Meat grinder?

A. And there was a saw there and a cuber.

(Testimony of Dorothy Cavin.)

Q. An electric saw? A. That is right.

Q. And an electric cuber?

A. That is right.

Q. Pots and pans were there?

A. Yes, there was.

Q. Anything else?

A. Well, no, there wasn't and then the silver-ware there was a lot of that there, we used that.

Q. Glass ware?

A. No, there might have been two or three but I had to buy them.

Q. Was the restaurant more or less equipped to do business when you took over?

A. Yes, it was, it was fully equipped.

Q. Except for the inventory and supplies?

A. There was nothing there.

Q. You had an icebox, did you?

A. Yes, I did, but the box I don't think it must have not belonged [424] to the place because it had a sign on it that it was not to be moved from there, that there was an attachment on it.

Q. Did Mr. Blackard tell you who owned the equipment?

A. No, he didn't and we never asked him.

Q. Now, referring to your records, will you turn to the page marked by the yellow sheet, what does that page reflect?

Mr. Cottis: Your Honor, I object unless he is either going to try to introduce that volume into evidence or ask a question, if she wants to refresh

(Testimony of Dorothy Cavin.)

her recollection, but to have her read into testimony from something that is not in evidence is objectionable.

The Court: Overruled, what does counsel have to say.

Mr. McCutcheon: I was about to tell the Court what I was trying to do so that the Court would know how to rule.

The Court: I will be glad to hear from counsel.

Mr. McCutcheon: I hope to show by the four or five months that the witness was in business there, show the average daily gross of that business at that time.

Mr. Cottis: Well, Your Honor, if that is what counsel intends to do I certainly object strenuously. What Mrs. Cavin's operation might have been there has no bearing at all on what Humphries operation was.

Mr. McCutcheon: May I be heard further?

The Court: Yes.

Mr. McCutcheon: It was during the period of time that [425] Mr. Humphries' contract and Mr. Campbell's contract with Starns and Phillips and Blackard was yet to run.

Mr. Cottis: Your Honor, object to counsel's way of putting that. There is no evidence at all of any contract at all with Starns. The contract itself is in evidence and speaks for itself and Starns' name isn't on it.

The Court: Jury will have to decide whether

(Testimony of Dorothy Cavin.)

Starns was a party to the contract or not. There has been some evidence about Mr. Starns. That objection is overruled. Counsel may proceed with the examination.

Q. (By Mr. McCutcheon): Mrs. Cavin, does the page that you now refer to in your record there, does that reflect your operation for a certain period of time there?

Mr. Cottis: Your Honor, I object to the leading question.

The Court: Overruled. State whether or not it does.

Q. (By Mr. McCutcheon): I would like to have you state whether or not that page of that document you have before you reflects your gross income from your business during a certain period of time, several months?

A. Well, the way she has got it fixed out here, I really couldn't answer that question clearly.

Q. Who do you refer to as "she"?

A. The bookkeeper, Lilly Nelson, she kept my books for me. [426] The way she has got it written here she would have to explain it more thoroughly to me.

Q. Do you recall — you needn't refer to that any further — Do you recall what your average monthly gross take was in the business?

A. How much we took in every month?

Q. Yes.

(Testimony of Dorothy Cavin.)

A. I couldn't really tell you right out.

Q. Do you recall what your average monthly net might have been.

Mr. Cottis: Your Honor, to make the record clear I assume that all this is over my objection?

The Court: If counsel so wishes. But any objection made to the net will be sustained because the net all depends on — I am going to permit the witness to testify, if she knows, what the gross income was and that all goes in over counsel's objection and exception.

Mr. McCutcheon: Do you recall what your gross might have been?

A. I couldn't tell you right out but I think it was about six or seven thousand dollars a month and I don't think November on and December did that well.

Q. Were there any card games played while you were there on the premises?

A. Not that I ever saw. [427]

Q. Were there card tables there?

A. No, there wasn't because we went down to the Northern Commercial and we bought another table for our customers to eat on and there was two of them down there and that is the only thing that those tables was ever used for was for people to eat there.

Mr. McCutcheon: Your witness.

(Testimony of Dorothy Cavin.)

Cross-Examination

By Mr. Cottis:

Q. Mrs. Cavin, have you ever discussed this case with Mr. Humphries or Mr. Campbell?

A. No, I haven't.

Q. Now, as I understand it, you testified that you paid Blackard and Phillips 10 per cent of your gross receipts, is that correct?

A. That is right.

Q. Was there any arrangement between you and Blackard and Phillips regarding a monthly minimum charge that you would pay?

A. No, there wasn't. That is all we went in was on a 10 per cent basis. What we made we gave them 10 per cent on it.

Q. And they paid all fuel and electricity?

A. That is right, and Frigidaires, anything that went wrong — the motors — they paid for it.

Q. And when you negotiated that arrangement with them did Mr. Starns have anything to do with it? [428]

A. I never knew that Larry Starns ever had anything to do with that because he never used to come in that I ever saw him.

Q. Is that book that is lying near you, is that your account book?

A. Well, this is for income tax and tax record and everything that we bought. It is just for the

(Testimony of Dorothy Cavin.)

restaurant, everything that we bought and took in and that is what she used to keep our records in.

Q. Have you had the book in your possession?

A. No, I haven't; in fact, we thought that the book was burned up and we had to go down when we went down to the States. We had an awful time trying to file our income tax and all the girls' Social Security and everything, and we had to hire lawyers down there to fix up our records and everything. We paid income tax and we didn't know whether it was right or not. We gave them a rough estimate down in Butte.

Q. How long since you have found the book?

A. Well, the way I found it was when Mr. McCutcheon and Humphries filed—I mean subpoenaed me — they told me that they had the books up in the office and if I wanted to come up and look them over that I could and that is the first time that I knew that the books were still in good shape. I thought they were burned up.

Q. With whom were you talking about the books?

A. With Mr. McCutcheon. He came down to the restaurant where [429] I work. He told me if I would like to come up and look them over and identify them to see if they were mine or not.

Q. Did you not testify to Mr. McCutcheon that you had not talked with him about this case?

A. Well, I didn't talk anything about it but

(Testimony of Dorothy Cavin.)

what he did, he came down and said that I would be subpoenaed and not to be afraid of anything and that was all he said, and then he said he had the books if I would like to come up and see.

Q. Did you ever go up and look?

A. No, I didn't, it seemed like I never got around to it. When I got through working I would go home.

Q. You haven't seen that book since the fire?

A. No, I haven't, I thought it was burned up.

Q. And that was last December?

A. December 21st it burned.

Q. And it was not until the subpoena was served on you that you knew that it was still in existence?

A. That was the first time I heard about it was when the subpoena was going to be served on me. He told me about it.

Q. Did he tell you how he obtained possession of it?

A. No, he didn't, not that I can recall. I don't remember him telling me.

Mr. Cottis: No further questions.

Mr. McCutcheon: No redirect.

The Court: Jurors have any questions? [430]

(No response.)

The Court: That is all, Mrs. Cavin. You may step down. Mr. McCutcheon, do you wish this book, it is not in evidence?

Mr. McCutcheon: No, I am not going to offer it, Your Honor.

(Testimony of Dorothy Cavin.)

The Court: I assumed that, I simply wanted to get it off the witness stand.

Mr. Cottis: Perhaps Mrs. Cavin would like it back.

Mr. McCutcheon: I intended to return it to her just as soon as the trial is over.

The Court: Another witness may be called.

Mr. McCutcheon: If the Court please, may I have a brief recess at this time. First I would like to inquire of the Bailiff if Mr. Hilgilien has shown in the witness room yet?

Bailiff: No, he has not.

Mr. McCutcheon: May I have a brief recess, Your Honor.

The Court: The Court will stand in recess for 5 minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. Another witness may be called.

Mr. McCutcheon: If the Court please, I have prepared an affidavit of service with attached subpoena and would like to present it to the Court and move at this time that a bench warrant issue for the arrest of R. E. Hilgilien.

The Court: Bench warrant may issue accordingly. The [431] paper may be filed.

Mr. McCutcheon: Call W. G. Spradlin.

Bailiff: He is not in the witness room.

Mr. McCutcheon: Call Mr. Campbell.

MARVIN CAMPBELL

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name?

A. Marvin Campbell.

Q. How long have you lived in Anchorage, Mr. Campbell? A. I was born here.

Q. How old are you? A. 25.

Q. Where does your mother reside now?

A. Seattle, Washington.

Q. Were your mother and father formerly the owners of the Panhandle premises?

A. Yes.

Q. And your father passed away, did he?

A. Yes, 1943.

Q. And left the premises to your mother, did he? A. Yes.

Q. And for how long a period of time did she own the Panhandle [432] premises?

A. She owned it right up until February of this year.

Q. Following the death of your father who occupied the Panhandle premises?

A. Tibbitts had a lease on the place, '41 up until last January.

Q. And to whom did Tibbitts sell the property—his lease?

(Testimony of Marvin Campbell.)

A. He sold his lease to Larry Starns and Joe Blackard.

Q. And did Tibbitts have a lease, did he?

A. Yes.

Q. I hand you a piece of paper and ask you to identify this, if you can?

A. This was the last lease that was signed for the Panhandle between my mother and Mr. Tibbitts.

Q. What is the date on that lease?

A. 13th day of January, 1948.

Q. And who is it signed by?

A. signed by my mother, Anna K. Campbell and C. W. Tibbitts, and witnessed by our lawyer, Alexander Cain.

Mr. McCutcheon: I would like to offer it in evidence.

The Court: It may be shown to counsel.

Mr. Cottis: May I inquire from the witness concerning this, Your Honor?

The Court: Yes.

Mr. Cottis: Mr. Campbell, did you see this lease signed [433] by your mother?

The Witness: Yes.

Mr. Cottis: Did you see it signed by Mr. Tibbitts?

The Witness: No, Mr. Tibbitts signed it in a different room.

Mr. Cottis: Did you see Mr. Cain sign it as a witness?

(Testimony of Marvin Campbell.)

The Witness: Yes.

Mr. Cottis: All this took place in Seattle, did it?

The Witness: Yes, in the law offices of Alexander Cain.

Mr. Cottis: Have you had custody?

The Witness: That came out of the files of Alexander Cain.

Mr. Cottis: Did you get it from his files?

The Witness: Yes.

Mr. Cottis: How long ago?

The Witness: I got it when I came up here in February.

Mr. Cottis: Of this year?

The Witness: Yes.

Mr. Cottis: And have you had custody of it since that time?

The Witness: Yes, I have, it has been in a sealed envelope.

Mr. Cottis: And, of course, there have been no alterations or anything made to it while it has been in your custody?

The Witness: No reason for altering it. [434]

Mr. Cottis: Have you ever seen Mr. Tibbitts sign his name?

The Witness: I believe I have.

Mr. Cottis: Do you know his handwriting?

The Witness: Yes.

Mr. Cottis: Well, Your Honor, I object to the

(Testimony of Marvin Campbell.)

introduction of this in evidence on grounds it has not been authenticated and on the further grounds that it is irrelevant.

The Court: May I see the paper?

Mr. McCutcheon: I would like to be heard on the question before the Court rules.

The Court: The paper bears a certificate of acknowledgement of execution by Tibbitts and another certificate with acknowledgement by Anna K. Campbell. While it may not be relevant perhaps it will be during the course of the trial. The objection is overruled and may be admitted.

Mr. Cottis: May I state a further objection, Your Honor, for the record?

The Court. Yes.

Mr. Cottis: I object on the further grounds that the acknowledgements are out of the Territory of Alaska and that therefore the Court has no power to take judicial notice of whether that notary was a proper notary public.

The Court: It may be admitted and marked Plaintiff's Exhibit 17, I believe. [435]

The Clerk: 17, yes, sir.

The Court: And may be read to the jury.

Mr. McCutcheon: Lease.

"This indenture, made and entered into this 13th day of January, 1948, by and between Anna K. Campbell of Seattle, Washington, party of the first part, hereinafter referred to as the Lessor, and C.

(Testimony of Marvin Campbell.)

W. Tibbitt of Anchorage, Alaska, party of the Second Part, hereinafter referred to as the Lessee;

“Witnesseth:

“1. The Lessor does hereby lease to the Lessee and Lessee hereby leases from the Lessor those certain premises situated in the City of Anchorage, Third Division, Territory of Alaska, and more particularly described as follows, to wit:

“The West Thirty Feet (30') of Lot Two (2) Block Forty-four (44) of the original townsite of Anchorage, Alaska, according to the official map and plat thereof.”

Together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging or in anywise pertaining.

“2. The premises are to be used for the purpose of conducting therein a restaurant, liquor store, saloon, card room and any legitimate merchandise business.

“3. The term of this lease shall be for three years and shall commence on the 1st day of January, 1948, and end on the 31st day of December, 1950, inclusive. [436]

“4. Lessor covenants and agrees to pay the Lessor as rental for said premises the monthly rental of \$400.00 in lawful money of the United States in advance on the 1st day of each calendar month of the lease term, to Lessor at Seattle, Washington,

(Testimony of Marvin Campbell.)

or to such other party or at such other place as the Lessor may hereafter designate.

“5. As partial consideration for the execution of this Lease, the lessee has heretofore paid the Lessor the sum of \$300.00 to apply on the \$400.00 monthly rental due for the month of December, 1950, the receipt of which is hereby acknowledged. If the Lessee shall have fully complied with all of the covenants, agreements, terms and conditions of this lease, but not otherwise, said sum so paid shall be credited on the payment of the rental due for the said month of December, 1950.

“6. The premises are accepted by Lessee in their present condition, and Lessee will at all times keep the premises neat, clean and in a sanitary condition, and will replace any glass of all windows and doors as may become cracked or broken, and except for reasonable wear and tear and damage by fire or other unavoidable casualty, will at all times preserve said premises in as good repair as they now are or may hereafter be put to. All repairs shall be at Lessee's sole cost and expense.

“7. The Lessee hereby covenants and agrees to pay all charges for light, heat and water which shall be charged against the leased premises during the full term of this lease. [437]

“8. All personal property on the leased premises shall at the risk of the Lessee. Lessor shall not be liable for any damage either to person or property sustained by Lessee or others caused by any defects

(Testimony of Marvin Campbell.)

now in said premises or hereafter occurring therein, except that the same occur by reason of defects in the walls, roof or foundation of said premises and shall not be liable for any act of negligent employees, co-tenants or other occupants of said building.

“9. Lessee agrees that he will keep said premises and use the same in accordance with the laws of Alaska and according to the Ordinances of the City of Anchorage, and in accordance with all directions, rules and regulations of the health officer, fire marshal, building inspector, or other proper officer of the City of Anchorage, at the sole cost and expense of the said Lessee, except that which pertains to the roof, outer walls and foundation. The Lessee will permit no waste, damage or injury to the premises. Lessee shall be liable for the removal of ice and snow on the sidewalks in front of and about the said premises.

“10. The Lessee will not use the premises for illegal purposes.

“11. Lessee shall keep the leased premises and the property on which the leased premises are situated, free from any liens arising from any work performed, materials furnished or obligations incurred by lessee. [438]

“12. Lessee agrees that he will not, without the written consent of the Lessor, assign this lease, or let or sub-let the whole thereof, or any part thereof,

(Testimony of Marvin Campbell.)

except that the Lessee can assign the whole of this lease once only. In the event this Lessor, pursuant to the foregoing provision for one assignment, does assign this lease, Lessor shall not be barred from afterwards refusing to consent to any further assignment.

“13. The Lessee shall allow the Lessor or Lessor’s agents free access at all reaonable times to said premises for the purpose of inspection or making repairs thereto in pursuance to Lessor’s obligations under this lease. The Lessor shall have the right to place and maintain “For Rent” signs in a conspicuous place on said premises for thirty days prior to the expiration of this lease.

“14. Lessee shall not make any alterations or additions or improvements on said premises without the written consent of the Lessor first had and obtained and all alterations and improvements which shall be made, shall be at the sole cost and expenses of Lessee and shall become the property of the Lessor and shall remain in and be surrendered with the premises as a part thereof at the termination of this lease.

“15. If any rents above reserved, or any part thereof, shall be and remain unpaid when the same shall become due, or if Lessee shall violate or default in any of the covenants and agreements herein contained, then the Lessor may cancel this [439] lease upon giving the notice required by law, and re-enter said premises, but notwithstanding such

(Testimony of Marvin Campbell.)

re-entry by the Lessor, the liability of the Lessee for the rent provided for herein shall not be extinguished for the balance of the term of this lease, and Lessee covenants and agrees to make good to the Lessor any deficiency arising from a re-entry and reletting of the premises at a lesser rental than herein agreed to.

“16. The failure of the Lessor to insist upon strict performance of any of the covenants and agreements of this lease, or to exercise any option herein conferred in any one or more instances, shall not be construed to be a waiver or relinquishment of any such or any other covenants or agreements, but the same shall be and remain in full force and effect.

“17. Any holding over after the expiration of said term, with the consent of the Lessor, shall be for an indefinite period of time on a month to month basis, which tenancy may be terminated as provided by the Laws of the Territory of Alaska, and during such tenancy the Lessee agrees to pay to the Lessor the same rate of rental as set forth herein and agrees to be bound by all of the terms, covenants and conditions as herein specified, so far as applicable.

“18. Subject to the provisions hereof pertaining to assignment and subletting, the covenants and agreements of this lease shall be binding upon the heirs, legal representatives, successors and assigns of any or all of the parties hereto. [440]

(Testimony of Marvin Campbell.)

“19. That at the termination of this lease, Lessee will quit and peaceably surrender said premises in as good condition as reasonable use and wear thereof will permit, damage by fire or the elements excepted.

“20. It is further provided and agreed that the Lessee shall and will protect the plumbing and light fixtures now in and used in connection with said premises, at his own proper cost and expense; pay all imposition assessed against him for the use of said property promptly, and before delinquency, and protect said premises against mechanics' as well as other liens.

“21. If the Lessor does assign this Lease in pursuance with the authority so to do in paragraph 12 hereof, the Lessor agrees that the said assignee will assume all of the obligations of the Lessee under this lease.

“In Witness Whereof, the said parties have hereunto set their hands and seals on the day and year first hereinabove written.

“/s/ MRS. ANNA K. CAMPBELL,
“Lessor.

“Witnesses:

“/s/ ALEXANDER L. CAIN,

“/s/ C. W. TIBBITT
“Lessee.

(Testimony of Marvin Campbell.)

‘State of Washington,

“County of King—ss. [441]

“This Is To Certify that on this 13th day of January, 1948, before me, the undersigned, a notary public, in and for the State of Washington, duly commissioned and sworn as such, personally appeared Anna K. Campbell, known to me to be the particular individual named in and who executed the foregoing instrument as lessor, and she acknowledged to me that she signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

“Witness my hand and Notarial Seal the day and year last above written.

“/s/ ALEXANDER L. CAIN,

“Notary Public in and for the State of Washington,
Residing at Seattle.

“My Commission expires January 28, 1950.

[Seal] “/s/ ALEXANDER L. CAIN,

“State of Washington

“Notary Public

“Commission Expires Jan. 28, 1950.

“State of Washington,

“County of King—ss.

“This is to certify that on this 13th day of January, 1948, before me, the undersigned, a Notary Public, in and for the State of Washington, duly

(Testimony of Marvin Campbell.)

commissioned and sworn as such, personally appeared C. W. Tibbitt, known to me and known to be the particular individual named in and who executed the foregoing [442] instrument as lessee and he acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein stated.

“Witness my hand and Notarial Seal the day and year last above written.

“/s/ ALEXANDER L. CAIN.

“Notary Public in and for the State of Washington,
Residing at Seattle.

“My commission expires on Jan. 28, 1950.

[Seal] “ALEXANDER L. CAIN,

“State of Washington

“Notary Public

“Commission expires Jan. 28, 1950.”

Q. Now, following the execution of that lease, Mr. Campbell, was the lease assigned?

Mr. Cottis: Your Honor, I object to the leading questions.

The Court: Overruled.

The Witness: Yes, sir. The lease was assigned to Larry Starns and Joe Blackard.

Q. (By Mr. McCutcheon): And will you state the negotiations that were carried on in connection with that assignment, the time and the place and the persons present, what was said and done.

(Testimony of Marvin Campbell.)

Mr. Cottis: Your Honor, if the assignment was reduced [443] to writing it will speak for itself.

The Court: Negotiations are of no consequence if the assignment was put in writing.

Q. (By Mr. McCutcheon): Was the assignment put in writing? A. Yes.

Q. Who was the lease assigned to?

A. Larry Starns and Joe Blackard.

Q. Did the parties continue to hold the premises under that lease? A. Yes.

Q. Did they continue to hold the premises with the consent of your mother?

Mr. Cottis: Object to the leading questions.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): Was the lease ever terminated?

A. Yes, we terminated on the 10th of April.

Q. How?

A. By written letters in which I personally presented Mr. Blackard and Mr. Starns.

Q. Were you representing your mother at that time? A. Yes.

Q. What authority did you have to represent her?

A. I have always taken care of the family business and I had [444] a power of attorney at that time.

Q. And why did you serve such a notice?

A. Because it appeared to me that—

Mr. Cottis: I object, Your Honor, what it appeared to Mr. Campbell.

(Testimony of Marvin Campbell.)

The Court: I don't see that that is relevant at all what happened in April of 1949.

Mr. McCutcheon: Well, it is preliminary to showing why notice was served on Mr. Humphries. It is preliminary to showing the defendant's reason for serving a notice terminating Mr. Humphries' lease.

The Court: All right, counsel may proceed upon that theory.

Q. (By Mr. McCutcheon): When was the notice served, approximately?

A. I served it on the 10th of April.

Q. And why?

Mr. Cottis: Same objection, Your Honor.

The Court: Overruled.

The Witness: Because in my estimation they had violated the lease.

Q. (By Mr. McCutcheon): How had they violated the lease?

A. They had allowed people to sublease portions of the premises.

Mr. Cottis: I object, Your Honor, that is a conclusion. [445]

The Court: Overruled.

Q. (By Mr. McCutcheon): Will you explain that in detail, please?

The Court: How is Humphries concerned in this? We don't care anything about any squabble between Mrs. Campbell and Starns on one side and Starns and Blackard on the other. How does this concern Humphries?

(Testimony of Marvin Campbell.)

Mr. McCutcheon: It would concern Mr. Humphries in this way, Your Honor, that I will endeavor to show to the jury the true reason for Mr. Blackard serving a notice terminating Mr. Humphries' lease.

The Court: Well, if counsel can show that it is relevant. Overruled.

Mr. McCutcheon: May I proceed?

The Court: You may proceed. All right, witness may answer.

The Witness: Well, I found out after the place was opened up that they had signed several subleases on the premises.

Q. (By Mr. McCutcheon): To whom?

A. They signed one with Vern Humphries. They signed another with Columbia Air Cargo.

Mr. Cottis: Your Honor, it is apparent on the face of it that the only source of the witness' knowledge must have been hearsay and I object on that ground. [446]

The Court: Objection is sustained unless there is something else. So far as Humphries is concerned, I presume that the witness relies upon the written instrument or series of them that have been put in evidence here.

Q. (By Mr. McCutcheon): What was done in the premises that you considered a violation of the lease?

A. They allowed gambling on the premises.

Q. And did you complain about it?

A. Yes, we had some discussion about the thing.

Q. Now, when did you become engaged in business with Mr. Humphries?

(Testimony of Marvin Campbell.)

A. He cut his finger off in an accident and he was laid up in bed so I took over the restaurant.

Mr. Cottis: Your Honor, the answer was not responsive and I ask that it be stricken.

The Court: Motion is denied.

Q. (By Mr. McCutcheon): I hand you a piece of paper and ask you to tell what it is, if you can?

A. That is the assignment that Tibbitt entered into with Starns and Blackard on the lease.

Q. Who is it signed by?

A. Signed by C. W. Tibbitt, Laurence Starns and Joe Blackard.

Q. What is the date on it? [447]

A. 27th of January, 1948.

Mr. McCutcheon: I will offer it in evidence.

The Court: Is there objection?

Mr. Cottis: I would like to look at it, Your Honor.

The Court: Is there objection?

Mr. Cottis: Yes, Your Honor, I object unless it is authenticated, unless the rest of the transaction which was in writing is also produced.

The Court: Let me see the paper. Objection is overruled and the assignment of lease may be admitted in evidence and appropriately marked and may be read to the jury. Marked Plaintiff Exhibit No. 18.

Mr. McCutcheon: May I take it from the file in the other case?

The Court: It may be taken from the file and

(Testimony of Marvin Campbell.)

a paper inserted indicating where it has been removed.

Mr. Cottis: May it please the Court, we have some witnesses waiting in the witness room and I don't think there is a possibility of getting to them this afternoon, so I would like the Bailiff to ask them to return tomorrow morning at 10:00.

The Court: Does the Bailiff know the names of the witnesses? You had better go with him.

Mr. McCutcheon: "Assignment of Lease:

"This Document, executed in duplicate at Anchorage, Alaska, the 27th day of January, 1948, by C. W. Tibbitt of Anchorage, [448] Alaska, hereinafter referred to as Tibbitt, and Laurence Starns and Joseph Blackard, both of Anchorage, Alaska, hereinafter referred to as the assignees.

"Witnesseth:

"That pursuant to paragraph twelve (12) of a certain Lease Agreement dated January 13, 1948, between Anna K. Campbell and C. W. Tibbitt pertaining to certain property in the city of Anchorage, Alaska, more particularly described as:

"The West Thirty Feet (30') of Lot two (2), Block Forty-four (44) of the original townsite of Anchorage, Alaska, according to the official map and plat thereof,

Tibbitt hereby assigns, transfers and sets over to the assignees as tenants in common, and not as joint tenants, all his right, title and interest in said premises by virtue of such lease agreement; and

(Testimony of Marvin Campbell.)

the assignees hereby assume all liabilities under the said lease agreement and agree to pay each month's rent as it becomes due, commencing with the rentals due February 1, 1948.

"This assignment is made for valuable consideration, receipt whereof is hereby acknowledged by Tibbitt; and this assignment is conditioned upon the transfer of a certain liquor license now held by Tibbitt to Joseph Blackard within thirty (30) days from the date hereof.

"In Witness Whereof, the parties hereto have set their [449] hands and seals the day and year first above written.

"/s/ C. W. TIBBITT,

"C. W. TIBBITT,

"/s/ LAURENCE STARNES,

"LAURENCE STARNES,

"/s/ JOE BLACKARD,

"JOE BLACKARD."

The Court: Will counsel suspend for a moment? The witnesses in the witness room who have already testified wish to know whether they may leave now or whether they are required to remain here.

Mr. McCutcheon: All witnesses for the plaintiff may be excused, if the Court please, they have already testified.

The Court: Very well, then, they may be excused. Counsel may proceed.

Q. (By Mr. McCutcheon): Mr. Campbell, what

(Testimony of Marvin Campbell.)

was the consideration for the assignment of that lease? A. Tibbitt paid us \$2,000.

Q. Now, what did Tibbitt own in the Panhandle premises?

A. He owned a liquor license.

Q. Did he own anything else?

A. No, he didn't.

Q. Did your mother own everything?

Mr. Cottis: Your Honor, I object. It is obviously without [450] the witness' knowledge and it is a conclusion of law as to whether his mother was the owner of it.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know what your mother owned?

A. Yes, I made up the inventory at the time that Tibbitt took it over and he paid us for the stock and all the equipment that was in the Panhandle was turned over to Tibbitt. He had a completely stocked bar-card room.

Q. State, if you know, what was paid for the assignment of the lease by Starns and Blackard?

A. I haven't any idea. I didn't have anything to do with the negotiations.

Q. Do you know what was paid by Starns and Blackard to Tibbitt for the assignment?

A. They paid him something like \$20,000 for the lease.

Mr. Cottis: Your Honor, I object because it is obviously hearsay.

(Testimony of Marvin Campbell.)

The Witness: I have checks to show for it.

The Court: How can you know that, Mr. Campbell, were you present at the negotiations or did somebody tell you that?

The Witness: I have Mr. Blackard's checks.

Mr. Cottis: I didn't catch the answer.

The Witness: In Mr. Blackard's checkbooks, his records of it.

The Court: Which are in your possession? [451]

The Witness: Yes.

The Court: The answer may stand.

Mr. Cottis: Your Honor, it is still hearsay whether it is a check book or not and I continue my objection. I would like to know how he acquired possession of Mr. Blackard's check book?

The Court: That can be brought out on cross-examination. Counsel may renew his objection later; for the present it will be overruled.

Q. (By Mr. McCutcheon): Now, what was sold for \$20,000 besides the lease?

A. I haven't the slightest idea. They probably sold their stock of liquor. I don't know what else they had.

Q. Now, what happened following the service of a notice terminating the lease?

A. Nothing happened until we started a lawsuit over it.

Q. And when did you commence the lawsuit?

A. Right after about ten days after we served this notice on them.

(Testimony of Marvin Campbell.)

Q. Now, how long following your service of a notice terminating the lease were you and Humphries served with a notice terminating your sublease? A. About five days.

Q. Now, when you went in business with Mr. Humphries, what equipment did he have possession of? [452]

A. He had apparently owned all the equipment in the Panhandle Restaurant so far as I know.

Q. And what did that equipment consist of?

A. Well, in the back——

Mr. Cottis: I object to what he apparently owned. If Mr. Campbell actually knows——

The Court: The question will be stricken.

Mr. McCutcheon: The question was, What equipment did he have possession of?

The Court: Yes, he may answer that—what equipment he had possession of but the witness said, “He apparently owned,” that is not responsive to the question. You may answer the question—what equipment he had possession of?

The Witness: He had a completely equipped restaurant.

Q. (By Mr. McCutcheon): How much did you pay to go in business with Mr. Humphries?

A. It was never discussed.

Q. How much of an inventory was maintained from the time you went in business with Mr. Humphries until the termination of your business?

A. I don't think I am qualified to answer that,

(Testimony of Marvin Campbell.)

it was quite a large stock we had on hand but the actual valuation of it I am not too familiar with it.

Q. Now, do you recall an incident with reference to moose meat? [453] A. Yes, I do.

Q. And do you recall Mr. Humphries' arrest?

A. Yes.

Q. Were you present at that time?

A. Yes, I was.

Q. What time of the day was it?

A. It was about eight-nine o'clock at night.

Q. And what had you been doing prior to that time that day? On the same day what had you been doing prior to that time of his arrest?

A. The thirty minutes before that?

Q. No, I mean the day time?

A. That afternoon we had been working on our books and at the end of the March accounts getting them straightened out.

Q. And by "we," who do you mean?

A. Mr. Humphries, our bookkeepers and myself.

Q. And had you been with him all the time?

A. Yes.

Q. And what time was he arrested?

A. About eight o'clock at night.

Q. And where was this?

A. Out in back of the Panhandle.

Q. And were you with Mr. Humphries then?

A. Yes.

Q. Where were you going? [454]

(Testimony of Marvin Campbell.)

A. We were just in the process of getting into our car—Mr. Humphries' car, rather, to go out to talk to our bookkeeper again.

Q. And will you tell what happened in detail?

A. We went out the back door. Just as we got out there the City Police Patrol Wagon was blocking the driveway and two policemen and Joe Blackard jumped out with guns and held us there.

Q. Did Joe Blackard have a gun?

A. Yes.

Q. Did he point it at you? A. Yes.

Q. Did you hold your hands in the air?

A. Yes.

Q. For how long a period?

A. 30 minutes or so.

Q. Then what happened?

A. Then after awhile Oscar Larsen, apparently the Game Official, came up.

Q. What did he do?

A. Blackard ran over and said there was some moose meat in the back of the car and threw the trunk open.

Q. Now, did you ever hear of any moose meat prior to that time? A. No. [455]

Q. Was that the first you had seen that moose meat? A. Yes.

Q. And then what happened?

A. Then there was some discussion there and they finally took Mr. Humphries and myself down to the Game Commission office.

(Testimony of Marvin Campbell.)

Q. Had you ever seen card games conducted on the premises? A. Yes.

Q. Where were they conducted?

A. In the back end. The first game was conducted between our storeroom and the end of our counter.

Q. And what period of time was that with reference to when the business was open, when did the card games first appear there?

A. They started in within a few days afterwards.

Q. And did they continue? A. Yes.

Mr. Cottis: Object to the leading question, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): What period of time did the card games operate there?

A. They operated there until sometime before we went to trial.

Q. What effect, if any, did this have on your business?

A. It didn't do it much good.

Q. What effect, if any, did it have?

A. It cut down the day's receipts. [456]

Q. And how much did it cut down the day's receipts?

A. Oh, it is pretty hard to say right now, it probably cut it down \$25-\$50 a day.

Q. And who was running the card games?

(Testimony of Marvin Campbell.)

A. The first fellow that ran it, the only identification we ever had with his name was Red. He is a known professional gambler around here.

Q. And did anyone else operate the card games?

A. Yes, he didn't last very long and then a man by the name of Crest took over.

Q. Was he operating the game for Mr. Blackard? A. Yes.

Mr. Cottis: Object, unless the witness knows of his own knowledge.

Q. (By Mr. McCutcheon): Do you know of your own knowledge? A. Yes.

Q. That he was operating the games for Mr. Blackard?

A. He was operating under the general house rule that govern these games that he was working under percentage.

Q. And what games were they playing?

Mr. Cottis: Ask that the answer be stricken as not responsive.

The Court: Motion is denied. [457]

Q. (By Mr. McCutcheon): What kind of games were they playing?

A. Dealer told me one night he was playing knock-poker.

Mr. Cottis: Object, if it is based on hearsay.

The Court: Objection is overruled.

Q. (By Mr. McCutcheon): Were the chips worth money? A. Yes.

Q. Where were they worth money?

(Testimony of Marvin Campbell.)

A. Over the bar.

Q. And what could you buy with the chips?

A. They bought a few beers over the bar, I believe.

Q. Did you ever see anyone buy drinks with the chips? A. Yes.

Q. Frequently?

A. No, there wasn't too much drink bought.

Q. How else do you know that the chips were of value?

A. You don't run a game for nothing.

Mr. McCutcheon: May we have a short recess, Your Honor?

The Court: Court will stand in recess for 10 minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present and counsel may proceed with the examination.

Q. (By Mr. McCutcheon): Were you present at the opening of the restaurant, Mr. Campbell?

A. Yes, I was.

Q. And were you employed with Mr. Humphries prior to going in business with him?

A. Yes, I worked with him most of the time he was in business.

Q. And you became a partner of his when he smashed his finger, is that correct? A. Yes.

Q. Now, do you recall what the average daily

(Testimony of Marvin Campbell.)

take of the business was during the period of time you were his partner?

Mr. Cottis: I object, Your Honor, he has already testified that he did not know.

The Court: If the witness knows he may answer, otherwise he should say he doesn't know.

Q. (By Mr. McCutcheon): Mr. Campbell, did I ask you that question earlier?

A. Not that I remember.

The Court: I do not recall the question, but my memory isn't controlling on the jury and the jury may remember whether the question was asked. At any rate it may be answered if the witness knows.

Mr. McCutcheon: I wouldn't want the impression left with the jury that he had been asked that question and testified that he didn't know. [459]

The Court: It isn't important enough to argue about, let's go ahead. Many questions are asked two and sometimes three or four or five or six times.

Q. (By Mr. McCutcheon): Do you know what the average daily take of the business was during the time you were in business with Mr. Humphries?

A. We did, I think, somewhere between \$150 and \$175 a day.

Q. That was gross income, was it?

A. Yes.

Q. Now, did you under your contract pay Mr. Blackard any money?

(Testimony of Marvin Campbell.)

A. No, he was never paid.

Q. Why not?

A. Well, there was discussion about the redecoration of the place between Mr. Humphries and Mr. Blackard and it was never ironed out.

Q. Now did Blackard pay your mother the rent following the lawsuit?

A. After I filed papers on him for eviction she never received any rent.

Mr. Cottis: Well, I object, Your Honor, it is irrelevant and any knowledge he would have would be hearsay.

The Court: I don't see the relevancy of what happened after the papers were served as respects rents.

Mr. McCutcheon: Only to show the feeling that existed [460] at the time, Your Honor, that was the time that Mr. Blackard served a notice on Mr. Humphries and Mr. Campbell and the question was for the purpose of showing what his attitude was at that time. Whether Blackard paid any rent for the place to Mrs. Campbell, I think, is a collateral matter entirely.

Q. When did you close the business down?

A. Somewhere around the 22nd of May.

Q. And why did you close it down?

A. Feelings just got too hot and business just disintegrated so that we just decided to just close it down.

Q. Now, what difficulties did you encounter?

(Testimony of Marvin Campbell.)

A. We had lots. Feelings were just running too high.

Q. Feelings between whom?

A. Between Blackard and Phillips and myself and Mr. Humphries.

Q. What, if anything, did Mr. Blackard do that affected your business?

A. Well, he tried to ruin the credit rating.

Q. How did he do that?

Mr. Cottis: I object, Your Honor, unless the time is pinned down prior to April 15th.

The Court: Overruled.

The Witness: Our creditors were all informed that we were going out of business—we were going broke.

Mr. Cottis: I object unless the witness knows it of his own knowledge and not of hearsay. [461]

The Witness: No, sir.

Q. (By Mr. McCutcheon): What was your last statement, Mr. Campbell? How many hours a day did you operate when you first went in with Mr. Humphries?

A. Supposed to be a 24-hour house.

Q. And did you always operate it 24 hours?

A. No, we didn't.

Q. Why not?

A. Because after we went home at night Mr. Blackard would close the place down and lock it up.

Q. And did he do this more than once?

A. Yes, on several occasions.

(Testimony of Marvin Campbell.)

Q. And what did you do?

A. Well, we would go down in the morning and when we would get down there ten or eleven o'clock in the morning and find the place all closed up and then try—and reopen it again.

Q. Were you able to serve breakfast?

A. No.

Mr. Cottis: Object to the leading question.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): How many meals a day did you serve?

A. If we would have operated the place the way it should have been operated we would serve all the meals ordinarily [462] served during the day.

Q. What meals are you referring to?

A. Breakfast, lunch and supper and late dinners and lunches.

Q. After Mr. Blackard closed the front door, how many meals did you serve then?

Mr. Cottis: Your Honor, I object, Mr. Campbell did not testify so far as I recall that Blackard had closed the front door.

Q. (By Mr. McCutcheon): Did Mr. Blackard at any time lock the front door? A. Yes.

Mr. Cottis: Object to it as leading.

The Court: Overruled.

The Witness: He did, yes.

Q. (By Mr. McCutcheon): When?

A. On several occasions.

(Testimony of Marvin Campbell.)

Q. On more than one occasion? A. Yes.

Q. And after he did this how many hours a day did you stay open?

A. Well, we opened up ten or eleven in the morning and that would cut out most of the lunch because it couldn't be brought up in time for the noon meals.

Q. And what other meals couldn't you serve?

A. We couldn't serve breakfast.

Q. Did this have any effect on your business?

A. Yes, it ruined it.

Q. And is that the reason you finally closed down? A. Yes.

Mr. Cottis: Object as leading, Your Honor.

The Court: Sustained.

Q. (By Mr. McCutcheon): Did you ever attempt to sell the business? A. Yes.

Q. To whom? A. A——

Mr. Cottis: Objection as leading.

The Court: Overruled.

Q. (By Mr. McCutcheon): To whom?

A. A man that went by the name of Slim Guyron.

Q. And did he make you an offer for the business? A. Yes.

Q. How much was it?

A. He offered \$9,000 plus inventory, as I remember it.

Q. And where was that offer made?

A. It was made with—he talked at the Panhandle and Stanley McCutcheon's office.

(Testimony of Marvin Campbell.)

Q. And was that sale ever consummated? [464]

A. No, it wasn't.

Q. Why not?

A. Because he stipulated that he wanted to get approval of all parties in this matter.

Q. And did he get approval of all parties?

A. No, he couldn't.

Q. Who didn't he get approval of?

A. Joe Blackard wouldn't approve.

Q. Now, you heard the testimony with reference to some spoiled meat, were you present when that incident took place? A. Yes.

Q. Will you testify as to what you saw and heard and what occurred?

A. Well, we went down there on several occasions that day and one of them we went through there and everything like was apparently in order.

Q. Was this after the restaurant had been closed?

A. Yes, closed and locked up. Everything was in order—the meat was in the locker and everything was in order—and then we went back a few hours later and they had a small pickup truck out in back and they had a lot of meat and stuff slung on it.

Q. Who did?

A. Mr. Blackard and Mr. Jack Guard.

Q. And what did you do? [465]

A. Well, the Marshal came down and talked to them and they—when we went back we found they

(Testimony of Marvin Campbell.)

had put it back in the storeroom but not in the freezing compartments where it belonged.

Q. And where did they put the meat specifically?

A. Well, it was put around on the counters and in the butchering room——

Q. Excuse me——

A. ——and different spots.

Q. Where was the meat prior to its removal, prior to the time they put it on the truck where had the meat been?

A. It had been in the big box—meat box—out in the back part reach-in box.

Q. Was it frozen?

A. Part of it was and part of it was fresh airborne meat.

Q. What was the condition of the meats at that time?

A. It was all in good condition as it had all been brought in from Seattle.

Q. How much meat was there?

A. I don't really know, there was quite a large amount.

Q. What was the condition of the meat after the truck incident?

A. Well, it got dirt on it and it got exposed to the air and one thing and another, it didn't do it any good.

Q. Where did Mr. Blackard put the meat when he took it off the truck? [466]

(Testimony of Marvin Campbell.)

A. It was thrown around inside the storeroom.

Q. Do you recall how long it remained there?

A. No, I don't, I think an hour or two.

Q. Was the storeroom—did Dr. Moon subsequently pay you a visit there at the premises?

A. Yes, after this episode, Dr. Moon showed up on the scene and condemned this meat.

Q. Why?

A. Said it wasn't sanitary and gave us a long speech about that we didn't have any business having anything like that in a restaurant.

Q. And was the restaurant open or closed at that time? A. Restaurant had been closed.

Q. How long had the restaurant been closed?

A. For several days.

Q. Now, do you remember a coal chute in the premises?

A. There was at one time a coal chute.

Q. Now, you heard Mr. Castlio's testimony this afternoon that he went down a coal chute to——

Mr. Cottis: Object to counsel testifying as to what the witness might have heard.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): What was the date the restaurant closed?

A. We closed it up about the 22nd of May. [467]

Q. When did you open the restaurant, approximately?

A. It was open the 6th of March, the whole place was.

(Testimony of Marvin Campbell.)

Q. Was there a coal chute leading into a store-room at that time?

A. The place where it had been during the course of the remodeling they laid a new floor over it.

Q. And did it seal the coal chute off?

A. Yes.

Q. And was the coal chute sealed off at the time you closed the restaurant? A. Yes.

Q. Was it possible for a person to go down the coal chute?

A. I don't think it would be very easy to go down there.

Q. Was it sealed over? A. Yes.

Q. Well, you would have to tear up the material that sealed it over, would you not? A. Yes.

Mr. Cottis: Object to the form of question, Your Honor.

The Court: Objection is sustained. Counsel should remember that he isn't testifying.

Mr. McCutcheon: I will remember, Your Honor.

Q. What happened to the premises?

A. They burned up.

Q. And on what date? [468]

A. I think it was about the 21st of December, something like that. I know it was a Tuesday before Christmas, I remember that.

Q. Did you inspect the premises after the fire?

A. After I was assured that the Fire Inspector no longer had any interest in the place I went in there.

(Testimony of Marvin Campbell.)

Q. Was there anything of salvage left?

A. No, there was nothing of any value.

Q. What did you find, if anything?

A. Well, I went in there and started to clear the place out.

Mr. Cottis: Your Honor, I object to the irrelevant and collateral nature of all this.

The Court: I don't see the point. I don't see the relevancy of this. What is sought to be disclosed by this testimony, Mr. McCutcheon?

Mr. McCutcheon: That some of the articles that were left there were sold by Mr. Blackard and they didn't belong to him, that is what I hope to show.

The Court: All right, go ahead.

Q. (By Mr. McCutcheon): Now, was there anything of value that survived the fire?

A. Yes, we went in and chopped out the bar and it seemed to be in pretty good shape.

Q. What happened to it?

A. It was later sold by Joe Sheen and Joe Blackard and Glen [469] Phillips.

Mr. Cottis: I object unless the witness knows of his own knowledge.

Q. (By Mr. McCutcheon): Do you know of your own knowledge? A. Yes.

Q. How did you know?

A. Because it has come out—it has been acknowledged by those people in letters and one thing and another.

Mr. Cottis: Then his testimony is not the best evidence, Your Honor, and I object on that ground.

(Testimony of Marvin Campbell.)

The Court: Objection is sustained and the jury will disregard the testimony.

Q. (By Mr. McCutcheon): Now, how do you know of your own knowledge that the bar was sold?

A. Because George Gramuth had the bar in the Anchorage Grill and he admitted that he had bought it from these people.

Mr. Cottis: Objection, Your Honor.

Q. (By Mr. McCutcheon): Was Mr. Blackard present when he admitted it?

A. No, it was in Harry's office.

Mr. Cottis: Objection to all this.

The Court: Yes, the jury is instructed to disregard the testimony because the witness isn't testifying from his own [470] personal knowledge but basing his statement upon what someone else told him and that under the circumstances cannot be competent evidence.

Mr. McCutcheon: I thought Mr. Blackard was present at the time, Your Honor, or I wouldn't have brought it out in that manner.

Mr. Cottis: I object to counsel's statement, it is prejudicial.

The Court: Overruled.

Q. (By Mr. McCutcheon): Was Mr. Blackard ever present during any discussions in connection with the bar?

A. No, Mr. Blackard never came into my sight up until the time of this trial.

Mr. Cottis: I never caught the answer, will you read it, Mr. Casey?

(Testimony of Marvin Campbell.)

(Answer read.)

Q. (By Mr. McCutcheon): I hand you plaintiff's Exhibit No. 11, tell me what you see in that?

A. It shows the general view.

The Court: Better hold it up before the jury so that they may see what you are looking at.

Q. (By Mr. McCutcheon): Continue to hold it up, if you will, and then answer my [471] questions. Do you know any of the parties in the photograph?

A. Yes, it is—Mr. Tibbitt is in this picture, Mr. Blackard and myself.

Q. And will you point them out, please?

A. This is Mr. Tibbitt.

Q. And who else?

A. Joe blackard is in there.

Q. And is there anyone else in the photograph that you recognize? A. Glen Phillips.

Q. Anyone else?

A. There is Mrs. Humphries and her children are sitting here.

Q. Now, does that photograph show the liquor store premises?

A. Yes, it shows the back view of it.

Q. Now, will you hold the photograph up and point it out to the jury, please?

A. This is the back of the liquor store.

Q. Now, were the restaurant premises visible from the street? A. Not very easily.

Q. Why not?

(Testimony of Marvin Campbell.)

A. Because they were directly behind the liquor store.

Q. Now, how many stools were there at the counter after it was remodeled?

A. I believe there are 16 .

Q. Are they shown in the photograph? [472]

A. Yes.

The Court: I think we may as well suspend at this time. You may step down, Mr. Campbell and return the photograph to the Clerk.

The trial will be continued until ten o'clock tomorrow morning and, ladies and gentlemen, under the law I am again obliged to remind you that you must not discuss the case among yourselves or with others or listen to any conversation about it, neither should you form or express an opinion about it until it is finally submitted to you.

You may now retire.

(Whereupon, at 5:00 p.m., Monday, June 27, 1949, the trial was recessed until 10:00 o'clock, a.m., Tuesday, June 28, 1949.) [473]

Tuesday, June 28, 1949

The Court: Clerk may call the roll of the jurors.

(Juror's names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Another witness may be called.

Mr. McCutcheon: I believe Mr. Campbell was on the stand, your Honor.

MARVIN CAMPBELL

called as a witness for the plaintiffs, having previously been duly sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. McCutcheon:

Q. Mr. Campbell I hand you Plaintiff's Exhibit 9 for identification and ask you to tell me what it is?

A. It is a credit slip from the Bank of Alaska.

Q. And who is it signed by?

A. It is signed by James Gardner.

Q. And is there a date on it?

A. Yes, it is March 12, 1948.

Q. And who is the credit slip directed to?

A. It is made out to me.

Q. And what does it represent?

A. It represents the repayment on a loan I made.

Mr. Cottis: Your Honor, I object to that answer. The memo speaks for itself. [476]

The Court: Overruled.

Q. (By Mr. McCutcheon): What does the credit memorandum represent?

The Court: It has already been answered.

Q. (By Mr. McCutcheon): Have you completed your answer to that question, Mr. Campbell?

A. It is a repayment of a note that I had. I borrowed some money.

Q. When did you borrow the money?

A. I borrowed it, I believe, on about the 6th of March.

(Testimony of Marvin Campbell.)

Q. And for what purpose?

A. I borrowed it for Mr. Humphries.

Q. And for what purpose?

A. He used——

Mr. Cottis: Your Honor, I object unless the witness knows of his own knowledge.

The Court: Overruled.

The Witness: He used it to repay Joe Blackard.

Mr. McCutcheon: I offer it.

The Court: It may be received as Plaintiff's Exhibit No. 9 and may be read to the jury.

Mr. McCutcheon: It was 9 for identification.

The Court: I see, it was marked for identification before Plaintiff's Exhibit No. 9. [477]

Mr. McCutcheon: "Date 3-12-48. Credit Marvin Campbell. Loan Payment \$300. Note No. 12722. Interest 3-12-48. 53c. Bank of Alaska. By James Gardner. Total \$300.53."

Your witness, Mr. Cottis.

Cross-Examination

By Mr. Cottis:

Q. Mr. Campbell, where is the note that that repaid?

A. I don't exactly know. I had it among my papers but I don't know exactly where it is right now.

Q. It was not burned in Mr. Humphries' house fire?

A. No, it is my personal papers.

Q. Can you find it and produce it?

(Testimony of Marvin Campbell.)

A. It might be at home in Seattle. I don't know where it is exactly. I had that with me but I don't know where the note is right now.

Q. Are you sure you borrowed the money on March 6th?

A. Yes, I believe that is the date.

Q. Could it have been March 4th?

A. No, it was a five-day note as far as I remember.

Q. At what interest rate?

A. Regular bank rate, I don't know, I think it was eight per cent or something.

Q. The total amount of the loan was \$300?

A. Yes.

Q. And did you not testify that Mr. Humphries used that [478] money to repay Joe Blackard part of what he owed him? How do you know that?

A. I watched the transaction.

Q. Will you tell me what you saw?

A. Well, I gave the money to Mr. Humphries.

Q. Where was this?

A. I believe in the Panhandle.

Q. And on about what day?

A. When we opened.

Q. That was March 8, 1948? A. Yes.

Q. And you had just acquired the money from the bank, had you? A. Yes.

Q. In what form was it—cash or cashier's check? A. Cash.

Q. All right, go on with what happened?

(Testimony of Marvin Campbell.)

A. Well, he was working around and he had it taken over to the bar and given it to Mr. Blackard.

Q. Who else was present?

A. I don't really remember.

Q. You were present? A. Yes.

Q. Mr. Humphries was present? A. Yes.

Q. Mr. Blackard was present? A. Yes.

Q. Was Mr. Phillips present?

A. I believe he was working around there.

Q. Was Mr. Starns present?

A. No, I don't think so, that was during the opening.

Q. What time of day was it?

A. Oh, it was somewhere around noon, I believe.

Q. Where was it that you gave Mr. Humphries the money? A. In the restaurant.

Q. In back of the counter? A. Yes.

Q. And then did you stay in back of the counter or did you accompany Mr. Humphries when he went over to talk to Blackard?

A. No, I was working around the counter there, too.

Q. And you stayed there, too? A. Yes.

Q. And where was Mr. Blackard?

A. He was working back of his counter, I remember.

Q. That is, in back of the bar? A. Yes.

Q. And you saw Mr. Humphries go over to Mr. Blackard?

A. Either he went over or he sent somebody over with the money.

(Testimony of Marvin Campbell.)

Q. Do you recall whether he went over or whether he sent [480] somebody over?

A. No, it is too long ago.

Q. Do you recall who was there he might have sent?
A. No, I don't.

Q. Well, do you remember that either Humphries or somebody on his behalf went over behind the bar with the money?
A. Yes.

Q. And did you see the money passed to Mr. Blackard's hands?
A. Yes.

Q. How much altogether?

A. I don't really know how much it was.

Q. Did the entire \$300 change hands?

A. Yes, he borrowed \$300 from me and he got some other money besides that and I don't know what exactly how much he gave to Mr. Blackard.

Q. Did you give the \$300 to Mr. Humphries or to this man he might have sent over?
A. Yes.

Q. Which one?

A. I think I gave it to Mr. Humphries first.

Q. And then you saw Mr. Humphries give it to somebody else?
A. Yes.

Q. And then you saw somebody else give it to Mr. Blackard?
A. Yes.

Q. And the money was in cash? [481]

A. Yes. Yes, in cash.

Q. Were the bills all of one denomination?

A. I don't really remember what denomination they were.

Q. Were they in an envelope?
A. No.

(Testimony of Marvin Campbell.)

Q. They were just open cash? A. Yes.

Q. Now, what time of day was this about?

A. Around noon.

Q. And you had just returned from the bank?

A. Yes.

Q. You are sure that Mr. Humphries was there?

A. Yes.

Q. Had Mr. Humphries been there that morning? A. Yes, he was around there.

Q. Did you not hear Mr. Humphries testify that he did not appear on opening day until after noon?

A. We were around there at various times during the course of that date.

Q. He was there during the morning?

A. Yes.

Q. Now, you don't remember whether you gave the money to Humphries or to this third person?

A. I handed it to Humphries as far as I know.

Q. And then you saw him hand it right over to the third [482] person? A. Yes.

Q. Did he put it in his pocket at all?

A. Not that I know of.

Q. To the best of your memory you handed him the open bills not in an envelope and he passed them right on to the third person. A. Yes.

Q. Did you hear any conversation between Mr. Humphries and the third person?

A. Yes, he told him to take it over to Joe in the bar and give it to him.

Q. But was this third person an employee of

(Testimony of Marvin Campbell.)

Humphries? A. I don't remember.

Q. Was he a customer?

A. No, somebody working around there.

Q. Carpenter or electrician or something like that?

A. No, somebody that was working around there during the course of the opening.

Q. That is, somebody who was working for Mr. Humphries? A. Yes, I believe it was.

Q. Was it a male or a female?

A. It was a man.

Q. Well, you were working for Mr. Humphries at that time, were you not? [483]

A. No, I wasn't.

Q. When did you start working for Mr. Humphries?

A. Oh, several days after the place opened I went to work.

Q. How did you happen to be on the premises at the time of this payment?

A. I was helping clean up both the bar and the restaurant and helping them get open.

Q. Now you are sure that the man to whom Mr. Humphries passed this money gave it to Blackard and not to Phillips?

A. No, it was given to Blackard.

Q. You saw the money actually pass into Blackard's hands? A. Yes.

Q. Did you hear any conversation between Humphries' employee and Blackard at that time?

(Testimony of Marvin Campbell.)

A. No, I wasn't paying any attention to it.

Q. But you did see the actual bills pass into Mr. Blackard's hands? A. Yes.

Q. Now, when did Mr. Humphries add some more money to this \$300?

A. About the same time.

Q. At the time that you handed him the \$300 that he produced some more money?

A. Yes, he got some other money besides that.

Q. Where did he get that from, from his pocket?

A. No, he loaned some other money besides that \$300.

Q. Where did he produce it physically from at that time?

A. That is pretty hard for me to answer

Q. Well, you are testifying, are you not, that you are sure that Mr. Blackard was re-paid on that day in full.

A. I don't know how much he was to be paid but I know that he got some money; I believe he got all of this \$300.

Q. You believe that he got all of the \$300?

A. Yes.

Q. Did he get any additional money?

A. I believe he did; how much I don't know.

Q. Well, you are sure that he got all of the \$300 because that \$300 in cash never left your sight, isn't that so? A. Yes.

Q. You never lost sight of that \$300?

A. No, I watched the transaction.

(Testimony of Marvin Campbell.)

Q. How high was the bar there?

A. Well, this took place in the end of the bar; there was an opening at the end of the bar.

Q. Was Blackard standing behind the bar?

A. He walked down to the end of the bar as I remember it.

Q. Did Humphries call him down to the end of the bar? A. Yes, I believe so.

Q. What was that conversation as nearly as you can remember it?

A. He was called down there about this transaction. [485]

Q. Can you remember the words that Humphries used? A. No, I don't even know.

Q. Do you remember who was talking with Blackard? A. No, I don't.

Q. Could you hear the conversation?

A. Why, I watched the transaction and the conversation. I know exactly how close I was to it.

Q. Could you hear any of the words that were spoken? A. I don't really remember.

Q. Did any pieces of paper change hands between Humphries' emissary and Blackard?

A. Yes, the money did.

Q. Anything else? A. No.

Q. Just money? Now, the money that was added to your \$300 what form was that in—cash, checks? A. It was all cash.

Q. And you don't recall where Humphries produced that other money from?

(Testimony of Marvin Campbell.)

A. No, I don't.

Q. But you are sure that he did produce that other money? A. Yes.

Q. You just don't know how much it was?

A. No, I couldn't swear to how much it was.

Q. And nobody that you can remember was present besides yourself, Humphries, Blackard and Phillips, is that right? [486]

A. There was a lot of people around there but I don't think they were paying much attention to it—a lot of people in there then.

Q. What did Blackard do with the money?

A. I didn't watch him put it in his pocket, I suppose.

Q. He had a safe right there, didn't he?

A. Yes.

Q. Did he open that?

A. I didn't see him open any safe.

Q. Do you know that he did not open the safe?

A. I wasn't watching him after that.

Q. All that you were watching him of the only period of time that you were watching him was when he was receiving this money from Humphries messenger? A. Yes, watched the transaction.

Q. And you don't recall who the messenger was?

A. No.

Q. But you don't think now it was Humphries himself who paid that money?

A. No, I don't think it was. He was making the payment.

(Testimony of Marvin Campbell.)

Q. How do you know what the money was being paid for?

A. I didn't know what it was being paid for.

Q. You did not know? A. No.

Q. Did you not testify on direct examination to Mr. McCutcheon [487] that that was a repayment of a loan that Humphries owed Blackard?

Mr. McCutcheon: May I hear that question again?

Mr. Cottis: Read the question.

(Question read.)

The Witness: I remember I testified in that paper was a repayment of a loan that I made with the bank.

Q. (By Mr. Cottis): Did you not also testify to the purpose for which that money was used? Can you speak up just a little bit, Marvin?

A. It was used—it was given to Blackard.

Q. Do you know what it was given to Blackard for?

A. Some transaction between him and Humphries.

Q. Do you know what transaction?

A. I believe it was some kind of a repayment of some sort.

Q. All right, what makes you think that?

A. People, from what they told me around there.

Q. Do you have any other knowledge besides what you were told? A. No.

Mr. Cottis: Your Honor, I ask that his testimony on this subject be stricken.

(Testimony of Marvin Campbell.)

The Court: Motion is denied. You refer to all of this subject of getting money from the bank and and given it to, as he says, to Humphries, seeing it given to Blackard? Motion is denied. [488]

Q. (By Mr. Cottis): Mr. Campbell, where did you get Mrs. Cavin's account book?

A. After the fire in the Panhandle and after the fire investigators were through and I knew that they were through I went into the Panhandle and went through the wreckage. I dug up several things.

Q. What else did you dig up?

A. I dug up checks and various papers that were lying around there, nobody else was interested in them so I picked them up.

Q. When was this? Can you speak up just a little bit more? A. It was in January.

Q. Was anybody with you at the time?

A. Yes.

Q. Who was with you?

A. My uncle was with me and I had another fellow that was helping me.

Q. How long did you spend probing through the wreckage?

A. We cleaned out a lot of the wreckage because the City was hollering about the wreckage was going to fall down, so we went in and cleaned out a lot of stuff in there. We spent a couple of days in there.

Q.. The three of you? A. Yes.

(Testimony of Marvin Campbell.)

Q. Now, when you found Mrs. Cavin's book did you know what it was?

A. No, it was all frozen up, all this stuff, and I just took [489] it home.

Q. Home to Seattle?

A. No, to the place where I was staying.

Q. And when did you discover what it was?

A. Well, after it thawed out I looked at it and it seemed to be an account book so I just hung on to it.

Q. Did you ever notify Mrs. Cavin that you had it?

A. I never even knew who Mrs. Cavin was until I came up here this last time.

Q. Until you came up here this last time?

A. Yes, and didn't seem to be such a person.

Q. You kept the book in your own custody all that time?

A. Yes, it was at my home in Seattle.

Q. It was at your home in Seattle?

A. Yes.

Q. And when did you bring it up here?

A. When I came up here the last time.

Q. When was that?

A. We left home the 2nd of June. I think we got here about the 5th or something like that.

Q. Where do you reside, Mr. Campbell, now?

A. Council Grove, Kansas.

Q. Did you have a book at Council Grove, Kansas?

A. No, it was in Seattle in my drawer.

(Testimony of Marvin Campbell.)

Q. When did you realize that the book belonged to Mrs. Cavin? [490]

A. All I knew about it was the names on it said Carl and Dorothy Cavin on some of the papers and I made inquiries around town and nobody seemed to know who they were or anything else.

Q. Until when? When did you find out who they were?

A. When I came up here the last time.

Q. How long ago was that that you found out who they were? A. Oh, maybe 10 days ago.

Q. At that time did you make any effort to return the book to Mrs. Cavin?

A. I see no reason why I should.

Q. You consider that the book belongs to you?

A. As far as I am concerned it is, nobody seemed to want it.

Q. Well, nobody knew you had it, isn't that so?

A. And I didn't know who Mrs. Cavin was either.

Q. But 10 days ago did you not find out who she was? A. Yes.

Q. And you made no effort to return the book?

A. No.

Q. Mr. Campbell, what about Joe Blackard's check book, where did you find that?

A. It was laying in a heap of snow and rubble and one thing and another with loose checks.

Q. Did you find that at the same time?

A. During the course of our probings I found

(Testimony of Marvin Campbell.)

some of his checks and one thing and another laying around there. [491]

Q. Some of his checks or a check book?

A. Some of his checks. They are in loose form.

Q. Now, where are they now?

A. Oh, some of them are here and I don't know where the rest went to.

Q. You don't know what you did with the rest of them? A. No, I don't.

Q. Did you take them to Seattle?

A. I believe I took some of the stuff to Seattle.

Q. When did you realize that those checks were Joe Blackard's?

A. Why I seen that on them.

Q. That is, immediately when you found them you realized that?

A. No, they were all frozen up, all that stuff.

Q. How long was it before you realized that they were Joe Blackard's?

A. Oh, several days.

Q. More than a week? A. No.

Q. Now did you ever make any effort to return them to Joe?

A. No, and Joe Blackard never made any effort to contact me after the fire either or my mother.

Q. Now, Mr. Campbell, how long were you operating with Mr. Humphries in that restaurant as a partner?

A. After he cut off his finger I took it over and helped [492] operate it from then on.

(Testimony of Marvin Campbell.)

Q. Can you place it more or less by month and day?

A. No, I wasn't paying much attention to the calendar.

Q. Do you know what month it was?

A. No, I don't, it was probably the latter part of March or the first part of April.

Q. When you went in with Mr. Humphries as a partner the restaurant had been operating for several weeks then? A. Yes.

Q. And prior to the time that you went in as a partner you had worked as an employee for Mr. Humphries?

A. Yes, worked as a dishwasher.

Q. But you were not an employee of Mr. Humphries at the time the restaurant opened?

A. No.

Q. And how long do you think it was after the restaurant opened before you became an employee of his? A. I think about a week.

Q. How much did he pay you as an employee?

A. Standard rate.

Q. And how much was that?

A. \$9.00 a shift.

Q. Had you been around the restaurant before you accepted employment with Mr. Humphries?

A. Yes, I had been around the Panhandle. [493]

Q. Constantly?

A. More or less from the time I got in town.

Q. Did you ever see a Federal Restaurant License on the premises?

(Testimony of Marvin Campbell.)

A. I don't know what he had there.

Q. Did you ever see one that you know of?

Mr. McCutcheon: Can you speak up a little bit?

The Witness: I never looked for one.

Q. (By Mr. Cottis): Did you ever see a Territorial Restaurant License?

A. I never saw any licenses.

Q. You never saw a City License either?

A. I don't know what he had there. I didn't pay any attention to it.

Q. After you went in partnership with Mr. Humphries did you examine the firm's books?

A. The books were kept by an accountant and I never looked at them very close at any time.

Q. And who was the accountant?

A. Harry Gottschaulk.

Q. Now, Mr. Campbell, did you hear Mr. Humphries testify that the gross business during May was slightly over \$3,000? A. Yes.

Q. And did you hear him testify that the gross business during April was slightly over \$3,000?

A. I wouldn't know how much it was in April.

Q. Do you know how much it was in March?

A. Yes.

Q. How much was it?

A. We had a statement, I think it ran \$3,300, something like that.

Q. Did you not testify to Mr. McCutcheon that the business was grossing from \$150 to \$175 a day?

A. Something like that.

(Testimony of Marvin Campbell.)

Q. Can you reconcile your figures with the \$3,000 monthly figures?

A. Restaurant business goes up and down. I believe that is pretty close to what we were doing.

Q. I am sorry, I couldn't hear your answer?

A. I think that is pretty close to what we were doing.

Q. What is?

A. \$150 to \$175 a day.

Q. Now, did not an accountant arrive at this figure of \$3,300 for March?

A. Yes, taken off the tapes.

Q. Do you think he was incorrect? A. No.

Q. And the business for May was something over \$3,000? A. Yes.

Q. And you don't know what the business for April was? [495]

A. No, I don't.

Q. You only operated 21 days in May, did you not?

A. Yes, wasn't business then better in May than it was in March?

A. No, I don't believe so.

Q. Well, now, during March did you not testify that the gross receipts were \$3300?

A. When you first open a business your business is generally lower than it was after you have been in business for a while.

Q. Well, then, it was lower in March was it than it was in May?

(Testimony of Marvin Campbell.)

A. No, it was about the same, should have been more.

Q. And do you have any recollection at all about April? A. No, I haven't.

Q. None at all? A. No.

Q. But you were working there steadily during April? A. Yes.

Q. And during April were you not a partner with Mr. Humphries? A. Yes.

Q. Are you and Mr. Humphries still partners? A. Yes.

Q. Were you ever in the premises when your father operated them? A. Yes.

Q. Did he have any card tables? A. Yes.

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. (By Mr. Cottis): Were you ever in the premises when Tibbitt and Hardy were operating?

A. Yes.

Q. Did they have—ever have any card tables while they were operating in there?

A. I never seen any.

Q. Your mother also owned the Annex Building, did she not, next door? A. Yes.

Q. Did you ever see any card games being played in there?

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection is sustained.

(Testimony of Marvin Campbell.)

Q. (By Mr. Cottis): Did you hear Mr. Humphries testify the other day that you were a bookkeeper? A. Yes, I am a bookkeeper.

Q. But you have no recollection of the April business?

A. I took the tapes and all that but I don't know exactly what it figured up to. [497]

Q. Can you approximate it?

A. No, I can't.

Q. Do you have those tapes available?

A. No, I haven't.

Q. What happened to them?

A. I haven't the slightest idea.

Q. In whose custody were they when you closed the premises in May?

A. I suppose the bookkeeper had them.

Q. That is, by bookkeeper you mean Mr. Gottschaulk? A. Yes.

Q. Have you ever asked him for them?

A. Yes, he has been asked for the records that he had and he apparently hasn't anything.

Q. Did he deny having them?

A. Just said he hasn't anything.

Q. Did he admit ever having had the tapes for April and May? A. He must have had them.

Q. Did he ever admit having them?

A. You are talking about April, aren't you?

Q. I am sorry, I can't hear you.

A. We were talking about the month of April?

Q. Did he ever admit having the tapes for the month of April?

(Testimony of Marvin Campbell.)

A. Yes, I am pretty sure that he had them at one time, I don't know——. [498]

Q. Did he ever admit having them?

A. I don't remember.

Q. Mr. Campbell, what were the liabilities of the restaurant when you went in there as a partner as nearly as you know?

A. Well, around the 10th of April we paid up all the bills that were due.

Q. And what did the bills that were due at that time aggregate, do you recall?

A. I think we paid up something like \$2500 in bills.

Q. And where did that money come from?

A. Money taken in off the restaurant.

Q. Did you advance any money to the enterprise? A. Not at that time.

Q. At what time did you advance money to the enterprise?

A. When it first opened up I loaned money and then a week or two later I think I put \$500 in it after Mr. Humphries lost his finger.

Mr. McCutcheon: Will you speak up a little bit; it is getting had to hear.

Q. (By Mr. Cottis): How much did you put in it originally when you owned it?

A. When I went into it?

Q. Yes. A. \$500.

Q. And then you put in another \$500 after Mr. Humphries hurt [499] his finger?

(Testimony of Marvin Campbell.)

A. That is about the time I went into it.

Q. Had you had any transactions with Mr. Humphries prior to that involving money?

A. Yes, and I loaned \$300.

Q. And that was on March 6th? A. Yes.

Q. Was the bar opened before the restaurant was opened? A. I think a few hours before.

Q. Couldn't have been a few days?

A. I don't believe so.

Q. You say all bills were paid off on April 10th?

A. The major portion of them were. There was one large bill that wasn't paid.

Q. And what was that?

A. A Columbia Air Cargo. There was a dispute about it and it was supposed to go back to Portland for adjustment.

Q. Was the bill to Bliss Construction paid?

A. There never was any bills to Bliss Construction as far as I know.

Mr. McCutcheon: Can you speak up a little bit, Marvin?

Q. (By Mr. Cottis): Had Mr. Bliss or the Bliss Construction Company done any work for you and Humphries?

A. Bliss Construction Company had done work for me during [500] the course of the construction. I had nothing to do with the restaurant during the course of construction.

Q. Has Bliss Construction Company done any work for Mr. Humphries that you know of?

(Testimony of Marvin Campbell.)

A. I don't know what the arrangements in the rest of the place were. I was too busy trying to keep my end of it straight.

Q. But you do know that on March 6th Humphries repaid in full to Mr. Blackard the loan or at least repaid at least \$300?

A. Yes, I am pretty sure he did.

Q. You are pretty sure he did? A. Yes.

Q. You actually saw that money change hands?

A. Yes.

Q. To Mr. Blackard? A. Yes.

Q. And you think that more money was added to it? A. Yes.

Q. And none was subtracted?

A. No, because he got some other money as far as I remember.

Q. But you can't recall where he got that other money from? A. No, I don't.

Q. From the time that you walked in there from the bank with the \$300 until it was paid to Mr. Blackard you never lost sight of that \$300?

A. No, I don't believe I did. [501]

Q. But you can't recall where any money was produced from? A. No, I can't.

Q. Did not Mr. Bliss try to collect some money from Humphries? A. I wouldn't know.

Q. Did not Mr. Bliss state that he would put a lien on the building for Humphries' bill?

A. I don't remember any such conversation.

Q. Now, has that Columbia Air Cargo bill been paid?

(Testimony of Marvin Campbell.)

A. I think they sued over it but I wasn't here at the time and I don't know what did happen to it.

Q. Did they join you as a defendant in the suit?

A. No.

Q. And despite the fact that you keep books you do not know whether that judgment has been satisfied?

A. It has never been satisfied as far as I know.

Q. During May when you and Humphries were operating the restaurant did you borrow food stuffs from Bob Cavera?

A. I never borrowed anything from him.

Q. Did Mr. Humphries ever borrow any foodstuffs that you know of?

A. I wasn't there all the time.

Q. Did you ever see him borrow any foodstuffs?

A. Not that I remember.

Q. Why was it that the premises—that the restaurant—was closed on May 22nd? [502]

A. It just got intolerable to operate it.

Q. And in what way did it become intolerable?

A. Well, they were closing it down and they were acting tough and cutting off our credit and it just got to be too much ill feelings in order to operate a business.

Q. So did you and Mr. Humphries discuss the matter? A. Yes.

Q. And you decided to close it down, did you?

A. We closed it down pending this outcome of this suit.

(Testimony of Marvin Campbell.)

Q. What bills do you recall owing on May 17th?

A. The major bills we owed were to the Jack Barett.

Q. And how much was that?

A. I don't remember the exact amount, I think it was around \$3000.

Q. Did you also owe Pierce Upholstery some money?

A. I don't know anything about that.

Q. Did you owe Herberts, Inc. some money?

A. That was before I got around there, I don't know anything about those bills.

Q. From your familiarity with the books of the firm do you recall whether you did or not owe Herberts, Inc. any money?

A. I never checked into the books to any great extent.

Q. Was the Bulk Sales Affidavit delivered to you when you became a partner in the business?

A. There was no papers transacted. [503]

Q. Did any decision of this Court entered on May 17th have anything to do with your decision to close the restaurant?

Mr. McCutcheon: Objected to as indefinite, calls for a conclusion.

The Court: Overruled.

The Witness: I don't know what this Court did on May 17th even.

Q. (By Mr. Cottis): Do you recall hearings that

(Testimony of Marvin Campbell.)

were going on in this Court during May in connection with this case?

A. They had something about an injunction or something, I believe.

Q. But do you recall the Court's decision regarding the injunction?

A. I don't believe I was in the Court room when it made its decision.

Q. You don't know what the Court's decision was?

A. No, the injunction was never given, I know that.

Q. Did that have anything to do with your's and Humphries' decision to close the restaurant?

A. It might have.

Q. Well, did it?

A. I don't know. I know that it just was impossible to operate any longer.

Q. When you became a partner of Mr. Humphries did Blackard [504] consent to the arrangement?

A. I believe that he discussed it with Mr. Humphries. It was well known to all. There didn't seem to be any objections that I know of.

Q. Did he ever give you a written consent?

A. I don't think there was ever anything in writing after the agreements they originally made.

Q. Did you hear Mr. Humphries' testimony in regard to the alleged waiver of the bond provision of that contract?

A. I believe so.

(Testimony of Marvin Campbell.)

Q. Were you present at the conversation at which that bond provision was claimed to be waived?

A. Well, I know that they had a big discussion. They laid out the liquor store on the floor.

Q. Were you present at the discussion?

Mr. McCutcheon: I don't believe the witness was through answering the question.

Mr. Cottis: He wasn't answering the question.

Mr. McCutcheon: What was the question?

Q. (By Mr. Cottis): Were you present at the discussion? A. Yes.

Q. All right, will you relate who else was present at the discussion.

A. Larry Starns was there and Joe Blackard, Vern Humphries. [505] I believe Bliss' foreman was around there and carpenters and other workmen around there.

Q. What was the name of Bliss' foreman, do you recall?

A. No, I don't, I know him by sight, that is all.

Q. And were they all present so that they could hear this discussion?

A. Yes, anybody within a block could hear it.

Q. And during that discussion did you hear any conversation with respect to the bond?

A. I know they had quite a discussion there but I don't really remember too much about it.

Q. Well, do you actually remember any discussion about the bond?

(Testimony of Marvin Campbell.)

A. I think I walked away after they seemed to be getting together because it wasn't in my department.

Q. Well, then, you did not hear any discussion about the bond?

A. No, I don't believe I did.

Q. When did you first learn that Mr. Bliss made a claim upon you or Humphries or both for construction work done for Humphries?

A. Bliss never made any claim on me for any work, any other than my own that I know of.

Q. And at this date you don't know of any bill owing to Bliss for work done in connection with the restaurant? [506]

A. I don't owe Bliss anything I know of.

Q. Do you know of any claim on Bliss' part for any bill for work done on the restaurant?

A. He never presented me with any claims.

Q. Do you have any knowledge of any such claim? A. No.

Q. None at all? A. None.

Q. To the best of your recollection when was it that the storeroom was locked?

A. I don't remember the exact date, but somewhere in the early part of April that Mr. Blackard suddenly decided we couldn't use the basement storeroom.

Q. Now, was it before or after the termination notice was served on Humphries?

A. I believe it started in before that.

(Testimony of Marvin Campbell.)

Q. In an affidavit sworn to May 6th did you not state that on the 20th of April Mr. Blackard locked the storeroom?

A. He locked the storeroom on several occasions before he finally permanently locked it.

Q. Do you recall making an affidavit to the effect that it was the 20th of April that the storeroom was locked?

Mr. McCutcheon: Just a moment, if the Court please, I would like to ask Mr. Cottis to show the affidavit if he has one to Mr. Campbell before he testifies. [507]

The Court: Affidavit must be shown to the witness.

Mr Cottis: May I be heard from, Your Honor?

The Court: Yes.

Mr. Cottis: Your Honor, this is not a third-person witness; this is a party opponent. As such I am not trying to impeach him, I am laying the foundation for introducing in evidence an admission by him as a party not as a third-person.

The Court: You are inquiring into a paper which is presumed it is assumed in your question he has signed. Under the rule the paper must be shown to the witness. If counsel wants to inquire about that he must show the paper to the witness first.

Mr. Cottis: Very well, Your Honor. May I have it marked for identification?

The Court: Yes, surely.

(Testimony of Marvin Campbell.)

The Clerk: It will be defendant's Exhibit B for identification.

Q. (By Mr. Cottis): Mr. Campbell, I show you what has been marked for identification as Defendant's Exhibit B. You may read it at your leisure to yourself.

The Court: While the witness is reading that paper we will stand in recess until seven minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Q. (By Mr. Cottis): Mr. Campbell, have you read what was marked for identification as Defendant's Exhibit B?

A. Yes, the part you are talking about.

Q. You have not read it all?

A. Read—I know about what is in it.

Q. Have you read as much of it as you want to read? A. Yes.

Q. Was this your signature on here, Mr. Campbell? A. Yes.

Q. Have you read it before you signed it, did you?

A. I don't remember if I did or not. I might have left that up to my attorney.

Q. You might have signed it without reading it, is that what I understand?

A. Yes. We told him the story and then he

(Testimony of Marvin Campbell.)

wrote it up the way he wanted it. Any errors would be up to him.

Q. Even though it was a sworn affidavit you might have signed it without reading it, is that correct? A. Yes.

Q. Mr. Campbell, in going over it just now did you find anything in it that is not correct?

A. It is substantially correct; as far as I know it is [509] correct.

Q. Well, what items are not completely correct?

A. I didn't see anything there I want to change.

Q. All right, then, on the 6th of May, 1948, did you not sign a written affidavit stating that it was on the 20th of April that the defendants took possession of your storeroom?

A. It says in there on or about the 20th, I believe.

Q. What is your testimony with respect to the date now?

A. I didn't keep a calendar in my pocket at all times and I believe what I stated it was correct.

Q. And what was that?

A. That the storeroom was probably locked up before that he started this action.

Q. That is, before April 20th? A. Yes.

Q. And before April 15th when the termination notice was served?

A. I believe that the trouble started before then.

Q. Do you believe that the storeroom was locked prior to that time?

(Testimony of Marvin Campbell.)

A. It had been locked and we had got into it and then made it a little tougher each time and probably there might have been several times before it was permanently, it was locked at times.

Q. Are you testifying now that the storeroom was locked prior [510] to April 14th, 1948?

A. Yes, it was.

Q. Are you testifying it was locked prior to April 16th, 1948? A. Yes, it was.

Q. Do you have any explanation that you would care to offer about why some other date wasn't put in this affidavit?

A. You can't get everything down exact hour and minute and it says about the 20th and I believe that is close enough.

Q. This affidavit was signed on May 6th, 1948, is that correct? A. Yes, I believe so.

Q. Now, in the same affidavit did you not sign a statement stating that on the 5th of May at the hour of 1:30 in the morning of said day the defendants took possession of your restaurant and shut off the cook range? A. Yes.

Q. And what is your testimony with respect to the date now?

A. On that occasion they did that and there had been several occasions for that too.

Q. There had been several other occasions prior to that time, had there? A. Yes, I think so.

Q. Is it your testimony now that there had been occasions prior to April 16th, 1948?

(Testimony of Marvin Campbell.)

A. Well, what are we talking about—the closing of the [511] restaurant?

Q. Yes.

A. I don't remember the exact dates but I know that on several occasions he closed the place up.

Q. On several occasions prior to May 5th, 1948?

A. Yes.

Q. Do you have any explanation of why those occasions were not mentioned in this affidavit?

A. No, you would have to ask my attorney.

Q. Your memory now is certain about that state that there were occasions prior to May 5th?

A. Yes, I believe there were.

Q. You have no doubt at all about it?

A. Yes, I can remember there were several occasions when it was closed down by Mr. Blackard.

Q. Prior to May 5th, 1948? A. Yes.

Q. Now, do you recall about when you went into partnership with Mr. Humphries?

A. When he cut off his finger is when I took over the place.

Q. Can you recall about what date that was?

A. It was around the end of March—1st of April.

Q. Could it have been as late as the 7th day of April? A. No.

Q. Could it have been as early as the 21st day of March? [512]

A. I couldn't say the exact date.

(Testimony of Marvin Campbell.)

Q. Your memory is not as clear on that point as it is on these items in the affidavit, then?

A. No, all the exact dates of everything that happened I couldn't swear to, but I know that on those occasions in that affidavit did happen.

Q. And you are testifying now that there were other occasions not set forth in this affidavit?

A. Yes.

Q. That were prior to the dates mentioned in this affidavit? A. Yes.

Q. Can you recall the approximate date that any card playing stopped in the premises?

A. I think that a week or two after I served notice to quit the premises that I think they stopped the card game.

Q. Is it your recollection now that they stopped card games before or after the termination notice was served on Humphries?

A. I believe it was after that.

Q. Do you think it was before April 20th at the time they took possession of your storeroom according to this affidavit?

A. I think it was after that, somewhere between the end—somewhere in the end of April and the first part of May.

Q. And it was not before you served your notice of April 10th? A. No, it was after that. [513]

Q. Now did you not just testify that it was a week or two after that?

A. Yes, something like that.

(Testimony of Marvin Campbell.)

Q. That is, after April 10th? A. Yes.

Q. Do you think it was more than two weeks after that?

A. No, I don't think so.

Q. Then it couldn't have been the 1st part of May, is that correct?

A. I don't know the exact date.

Q. Did you hear Mr. Humphries testify that he had sent Blackard a bill for paper hanging?

A. Yes.

Q. Did you ever see that bill? A. Yes.

Q. Do you have a copy of it?

A. I haven't a copy.

Q. Do you recall what date that was made out?

A. No, I don't.

Q. Did you ever see it delivered to Mr. Blackard? A. I don't really remember.

Q. Did you ever see it dropped in a mail box?

A. I didn't do anything so I don't know.

Q. If you had seen the bill delivered to Mr. Blackard do you think you would now recall having seen it? [514]

A. It was a matter between Mr. Humphries and Mr. Blackard and I didn't really know too much about it.

Q. If you had seen the bill delivered to Mr. Blackard do you think you would recall having seen it?

A. It has been a long time ago, I don't know.

Q. Was there any discussion in your presence

(Testimony of Marvin Campbell.)

about the 6-per cent of gross receipts or the minimum of \$200 that was to be paid to Mr. Blackard each month?

A. Yes, I seen copies of that lease after I had been in there a while.

Q. Was there ever any discussion in your presence about those sums that you recall?

A. Yes.

Q. Will you tell me about when that discussion was and who was present?

A. I can't tell the exact date, I know that Blackard wanted payment of the rent and the bookkeeper made out the records—a statement of them—but there seemed to be some discussion about paper hanging in the place which didn't have anything to do with me.

Q. And who was present at the conversation, do you remember?

A. We had several conversations. Blackard came over and talked about it.

Q. To ask for his payment?

A. Yes, he asked for his payment. [515]

Q. Was any payment ever given to him that you know of? A. No.

Mr. Cottis: I offer in evidence what has been marked for identification as Defendant's Exhibit B.

The Court: Is there objection?

Mr. McCutcheon: No objection.

The Court: It may be admitted and read to the jury and marked Exhibit B.

(Testimony of Marvin Campbell.)

Mr. Cottis: It is entitled:

“In the District Court for the Territory of Alaska
Third Division
No. A-5979

“VERN HUMPHRIES and MARVIN CAMP-
BELL,

“Plaintiffs,

“vs.

“LAURENCE STARNs, JOE BLACKARD and
GLEN PHILLIPS,

“Defendants.

“Filed in the District Court, Territory of Alaska,
Third Division, May 6, 1948.

“M. E. S. BRUNELLE,

“Clerk,

“By MARY E. THAYER,

“Deputy.

“COMPLAINT

“Comes now the plaintiff and for cause of action
against the defendants complains and alleges as
follows:

I.

“That said plaintiffs are copartners engaged in
the restaurant business under the firm name and
style of Alaska Food Service, said business
being located at Anchorage, Alaska, in premises

(Testimony of Marvin Campbell.)

described [516] as the Panhandle Bar and Cafe at 314 Fourth Avenue in said city.

II.

“That said defendants purportedly hold a leasehold right in said premises by virtue of a lease from Anna K. Campbell, owner, to defendants.

III.

“That on or about the 4th day of February, 1948, at Anchorage, Alaska, defendant, Joseph Blackard, entered into a lease agreement with plaintiff, Vern Humphries, whereby defendant agreed to lease to plaintiff Vern Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Joseph Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for said operation.

IV.

“That it was further agreed by the terms of said lease described in paragraph III hereof, that plaintiff would pay to defendant as rental for said premises, six per cent (6%) of the gross receipts derived from all operations of said restaurant business or the sum of two hundred dollars (\$200.00) per month, whichever might be the greater.

(Testimony of Marvin Campbell.)

V.

“That pursuant to an offer by defendant, Joseph Blackard, and acceptance by plaintiff, Vern Humphries, said agreement [517] of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Vern Humphries, from defendant in accordance with the terms of said agreement.

VI.

“That relying on said agreement, plaintiff expended large sums of money in the construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business, including ranges, stools and other necessary fixtures and equipment.

VII.

“That said counter and equipment is located in the Southwest portion of said Panhandle premises. That said restaurant business was so located at the direction of defendants herein.

VIII.

“That plaintiffs are now entitled to the possession of said restaurant premises in accordance with the agreement existing between plaintiff and defendant.

IX.

“That plaintiff has performed all the things and

(Testimony of Marvin Campbell.)

conditions required by said agreement to be performed by the lessee.

X.

“That plaintiff commenced the operation of said restaurant business on or about the 6th day of March, 1948. [518]

XI.

“That since the commencement of said business, defendants have maliciously, wilfully and wantonly interfered with plaintiff’s business, resulting in great loss of profits to plaintiff.

XII.

“That on or about the 20th day of April, 1948, defendants took possession of plaintiffs’ storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof, all to plaintiffs’ damage.

XIII.

“That defendants have refused and neglected to provide plaintiffs’ light, heat and water for said restaurant business as required by said agreement, all to plaintiffs’ damage in the sum of five hundred seventy-five dollars (\$575.00).

XIV.

“That defendants have maliciously, wilfully and unlawfully operated and conducted gambling games interfering with and otherwise being detrimental to plaintiffs’ business all to plaintiffs’ damage.

(Testimony of Marvin Campbell.)

XV.

“That defendants have wilfully and maliciously injured plaintiffs’ credit rating, much to plaintiffs’ damage.

XVI.

“That on or about the 5th day of May, 1948, defendants did, with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit the delivery of fuel oil to [519] plaintiff, all to plaintiff’s damage.

XVII.

“That on or about the 5th day of May, 1948, at the hour of 1:30 o’clock in the morning of said day, defendants took possession of plaintiffs’ restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs’ customers that the premises were permanently closed and that plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs’ business.

XVIII.

“That because of the acts of defendants, plaintiffs have been damaged in the sum of ten thousand five hundred seventy-five dollars (\$10,575.00).

XIX.

“That defendants threaten to continue interfering with plaintiffs’ business and that plaintiffs have no speedy or adequate remedy at law.

(Testimony of Marvin Campbell.)

XX.

“That defendants have threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business.

“Wherefore, Plaintiffs pray judgment against defendants as follows:

“1. For the sum of ten thousand five hundred seventy-five dollars (\$10,575.00) in actual damages.

“2. For the sum of Ten Thousand Dollars (\$10,000.00) in exemplary damages.

“3. That defendants and each of them be restrained and enjoined from in any manner interfering with plaintiffs’ business.

“4. For such other and further relief as the Court may deem equitable in the premises.

“McCUTCHEON & NESBETT,

“By /s/ S. McCUTCHEON,

“Attorneys for Plaintiffs.

“United States of America,

“Territory of Alaska—ss.

“Vern Humphries and Marvin Campbell, being first duly sworn, each for himself and not one for the other, doth depose and say: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

“/s/ VERNON HUMPHRIES,

“/s/ MARVIN CAMPBELL.

(Testimony of Marvin Campbell.)

“Subscribed and Sworn to before me this 6th day of May, 1948.

“[Seal] /s/ SHELLE W. BROOKS,
 “Notary Public in and for
 Alaska.

“My commission expires: 2-3-52.” [521]

Q. Mr. Campbell, did you see Mr. Starns around the premises between February 4th and the end of February?

A. Yes, he was on the place off and on.

Q. Frequently?

A. Yes, he was in and out of there.

Q. Was he ever absent for more than a week at a time?

A. I don't know whether he was or not. I know he made a trip outside.

Q. During that period of time, do you think?

A. Yes, he made a trip outside shortly after I came up here, I believe. He was gone for I don't know how long, for several days. I don't know how many days he was gone but I know he was outside.

Q. But between February 4th and the end of February was he ever absent from the premises for more than a week at a time?

A. I didn't pay any attention to it.

Q. But you are sure that he was there off and on between February 4th and the end of February, 1948?

A. Yes, he was there.

(Testimony of Marvin Campbell.)

Q. Was he there as many as ten different days, do you think? [522]

A. I never counted them, but I seen him there ever so often and when they were constructing the front and especially when he was constructing his liquor store he was there quite a bit.

Q. And that was during that period, was it?

A. Yes, he constructed on the place all during February.

Q. Do you recall what day it was, approximately, that there was this wild discussion with reference to the placement of the liquor store?

A. No, I don't know the exact date, somewhere around the end of February, I believe.

Q. Do you recall who was present?

A. Yes, Larry Starns was there and Joe Blackard and I was there, Vern Humphries, construction workers and foremen.

Q. Was Harold Brand there?

A. He could have been, he was around there quite a bit, living there, in fact.

Q. You don't happen to remember whether he was there at that particular time?

A. No, there was a lot of people grouped around there, he could have been there.

Q. Was Leo Tyler there?

A. I don't believe so.

Q. And at that discussion you don't recall having heard anything about a bond?

A. Well, when they started hashing it out I think that I [523] walked away.

(Testimony of Marvin Campbell.)

Mr. Cottis: Your Honor, I offer in evidence the entire file in this cause.

Mr. McCutcheon: Which file is it?

Mr. Cottis: 4979, the cause we are trying here.

Mr. McCutcheon: Well, I object to it on the grounds——

The Court: Objection is sustained.

Mr. Cottis: Will you mark for identification what purports to be an affidavit dated the 17th of May, 1948.

The Clerk: Defendant's Exhibit C for identification.

Mr. Cottis: I offer in evidence what has been marked Defendant's Exhibit C for Identification.

Mr. McCutcheon: No objection.

The Court: It may be admitted and may be read to the jury and marked Defendant's Exhibit C.

Mr. Cottis: It has the same title as Exhibit B that I read you a minute ago.

This is called:

“Affidavit in Reply to Defendants' Affidavit Opposing Application for Restraining Order”

and it is marked:

“Filed in the District Court, Territory of Alaska, Third Division, May 17, 1948.

“M. E. S. BRUNELLE,

“Clerk.

“By LOUISE ANNEBEL,

“Deputy.

(Testimony of Marvin Campbell.)

“United States of America, [524]

Territory of Alaska—ss.

“Comes now Vernon Humphries, being first duly sworn on oath, deposes and says:

“That plaintiffs have complied in every respect with all covenants and agreements to be kept and performed on the part of plaintiffs in connection with the lease agreement existing between Vernon Humphries and Joseph Blackard.

“That on or about the 2nd day of March, 1948, at the Panhandle premises, defendant Joseph Blackard, expressly waived the provisions of said lease agreement, requiring—‘Humphries shall provide bond in the sum of Three Thousand Dollars for the purpose of protecting Blackard from any claims made against Blackard and arising out of acts or omissions to act on the part of Humphries.’

“That on said date in the presence of Larry Starns, Harold Brand and others, affiant offered a bond in the sum of Three Thousand Dollars to the said Joseph Blackard and at that time inquired of the said Joseph Blackard if he would be satisfied with one Leo Tyler and Larry Starns as sureties. That the said Joseph Blackard thereupon advised affiant that he would not require a bond as provided in said agreement. That subsequently during negotiations for the sale of affiant’s restaurant business, Joseph Blackard again reiterated

(Testimony of Marvin Campbell.)

his waiver of the provisions of said agreement requiring a bond and advised the prospective purchaser that no bond had been required and none would [525] be necessary.

“Affiant further states that all provisions in said agreement for the payment of rent have been kept by affiant and that defendant, Joseph Blackard, is now indebted to affiant for moneys advanced for the payment of bills of the said Joseph Blackard.

“Affiant denies that he has at any time had illegal moose meat on the premises.

“That on or about the 12th day of May, 1948, in an action brought by Marvin Campbell and his mother, Anna K. Campbell, against defendants for possession of said Panhandle premises on the grounds that defendants had committed a breach of their lease by conducting gambling games on said premies and for other grounds, the jury found the defendants guilty.

“Affiant says that unless a restraining order continues during the pendency of this action, defendants will continue to conduct gambling games and otherwise interfere with affiant’s restaurant business.

“/s/ VERNON HUMPHRIES.

“Subscribed and Sworn to before me this 17th day of May, 1948.

“[Seal] /s/ S. McCUTCHEON,

“Notary Public in and for
Alaska.

“My commission expires: 12-31-51.” [526]

(Testimony of Marvin Campbell.)

Q. Now, Mr. Campbell, did you testify that the card games stopped within a week or two after April 10th?

A. I believe that they did.

Q. Mr. Campbell, who was the prospective purchaser who offered you and Humphries \$9,000 for the restaurant?

A. Slim Guyron.

Q. Would you spell his last name?

A. It always did tangle me up. It is G-a-r-v-i-n.

Q. G-a-r-v-i-n?

A. I believe that is it.

Q. Do you know what his first name is?

A. No, that is the name he always went by.

Q. How long have you known him at the time he made this offer?

A. He had been around there, I don't know exactly how long. Mr. Humphries had known him a lot longer than I had.

Q. He had been around the restaurant premises, had he?

A. Yes, as a customer.

Q. And about when was it that he made this offer?

A. Shortly before we went out of business.

Q. Would it have been after the first day of May?

A. Yes, it was.

Q. Were there ever any other prospective purchasers for the business that you can recall now?

A. No, I know we had several long discussions with this man. [527]

Q. With Garvin?

A. Yes.

(Testimony of Marvin Campbell.)

Q. How was he prepared to pay in his \$9,000?

A. It was a cash proposition.

Q. Did you investigate his credit?

A. No, but he was well known and he had backing.

Q. Was the \$9,000 to include equipment?

A. It was for equipment.

Q. Was it to include whatever inventory and supplies were on hand?

A. No, the inventory is always besides that?

Q. That is, the purchase price was to be \$9,000 plus the inventory of supplies? A. Yes.

Q. And the man was to pay that price in cash?

A. Yes.

Q. Now, did Blackard interfere with that sale?

A. He wouldn't approve of it.

Q. Did you ask him to approve of the sale?

A. He was asked to approve it.

Q. Did you ask him to approve it?

A. I didn't ask him.

Q. Did anybody ask him to approve it in your presence? A. No, I don't believe they did.

Q. How do you know that he was asked to approve it? [528] A. Why, I just know it.

Q. Now, you heard that portion of Defendant's Exhibit C which I just read to the jury which states as follows: "That subsequently during negotiations for the sale of affiant's restaurant business, Joseph Blackard again reiterated his waiver of the provisions of said agreement requiring a bond and ad-

(Testimony of Marvin Campbell.)

vised the prospective purchaser that no bond had been required and none would be necessary," were you present at that time?

A. Not that I know of.

Q. Do you recall any conversation at which Blackard told Garvin that no bond would be required?

A. I don't think that was the point that he was interested in.

Q. Was there any discussion at all with Garvin about bonds?

A. I didn't have any discussion with him.

Q. Did you hear any discussion with Garvin about the bond?

A. No, I wasn't around all the time.

Q. And, again, will you tell me when it was that these negotiations with Garvin were going on?

A. It was shortly before we closed out the restaurant.

Q. Would it have been after the middle of May?

A. It was somewhere around that time, I believe.

Q. Where is Mr. Garvin now?

A. I believe he is working at some construction camp.

Q. Near Anchorage? [529] A. Yes.

Q. How long since you have talked with him?

A. Why, I haven't been up here in a year to talk to anybody.

Q. Have you talked with him in the last year?

A. No, I don't believe I have.

(Testimony of Marvin Campbell.)

Q. What was his occupation at the time that he was negotiating with you for the purchase of the restaurant?

A. I don't believe he was doing anything.

Q. And what is his occupation now so far as you know?

A. I think he is cooking.

Q. He is cooking?

A. I believe he is.

Q. And you are testifying now that he was going to pay \$9,000 in cash, plus inventory?

A. Yes.

Q. Although he was unemployed at the time?

A. He was backed. He had backing to go into the place.

Q. Now, speaking of backing, can you tell the Court how much money you have advanced Vernon Humphries in connection with the restaurant business and in connection with these lawsuits?

A. No.

Q. Can you tell the Court how much money you have advanced Vernon Humphries in connection with the restaurant business?

A. The one down there?

Q. Yes. [530] A. I put up \$500 in cash.

Q. And that is all that you have ever advanced?

A. Well, I loaned him \$300 that I loaned off the bank before that, but that was repaid.

Q. Have you ever lent Humphries anything besides the \$500 and the \$300?

A. Not in connection with the Panhandle.

(Testimony of Marvin Campbell.)

Q. Did you ever pay any Panhandle bills that Humphries had incurred?

A. No, not out of my pocket.

Q. Well, how did you pay them, if you did pay any?

A. We paid a lot of the bills through the account in the Bank of Alaska Food Service, paid lots of bills.

Q. Did your mother ever lend any money to Alaska Food Service?

A. No, she had nothing to do with it.

Q. Did you read the complaint in this action before you signed it, do you recall?

A. I don't believe I did.

Q. You think that you did not read it, is that your testimony?

A. No, I don't believe I looked it over very closely.

Q. You are testifying that you don't believe that you looked it over very closely? A. Yes.

Q. That is your testimony? [531] A. Yes.

Q. Do you think that you remembered every word in it? A. No, I don't believe I did.

Q. Do you think that you looked at each paragraph in it?

A. We just told the story to our lawyer and I might have glanced over the papers but I think I left most of the detail up to him.

Q. You think that you glanced at each paragraph in it?

(Testimony of Marvin Campbell.)

A. It has been quite a while ago and I don't really remember what I did.

Q. Did you read that portion of the complaint, if you can remember, which states: "Vernon Humphries and Marvin Campbell, each being duly sworn, doth depose and say: 'That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.'" Did you read that portion of it as nearly as you can recall? A. I don't know what I did.

Q. Do you recall reading it or not reading it?

A. I don't remember much about it. I know I looked over those papers and signed them and that is about all I remember.

Q. Do you know whether during May the partnership comprised of you and Humphries borrowed eggs from Bob Cavera?

A. I wouldn't know a thing about it.

Q. Were you there during May of 1948? [532]

A. Yes, I was there but I was working mostly in the afternoon and evening and there could have been a lot of things happen in the morning that I didn't see.

Q. Was Mr. Humphries working at that time?

A. He was around there, I don't know if he was working or not.

Q. That was before he went outside on account of his—to have his daughter's health and his thumb looked after? A. Yes.

(Testimony of Marvin Campbell.)

Q. When *did* negotiations for the \$9,000 sale to Garvin were going on did you talk to Garvin—many times?

A. Yes, I was there when most of the discussion went on with him.

Q. Can you recall approximately how many times you talked with him?

A. Oh, we talked with him several times, I don't know exactly how many.

Q. Do you think more than three times?

A. I believe so.

Q. Where were most of these discussions held?

A. We talked to him on the street and in McCutcheon's office, different places, and in the restaurant, I believe.

Q. But you, yourself, never asked Blackard for his consent to that sale, is that correct?

A. No, I didn't talk to Blackard, as I remember.

Q. And these negotiations were going on just before you closed?

A. Sometimes around there.

Q. Within a week or two of your closing?

A. Yes, I believe so.

Q. Now, I want it to be clear, you didn't put any money into this business to begin with excepting the loan of \$500 and the loan of \$300, is that correct?

A. Yes.

Q. You had nothing else in it? A. No.

Q. And a month later in May you had an opportunity to sell it for \$9,000 plus inventory, is that correct?

A. Yes, along with Humphries.

(Testimony of Marvin Campbell.)

Q. I beg your pardon?

A. Along with Humphries.

Q. And you would have been entitled to half of that \$9,000 plus half of the inventory, is that correct?

A. That was never discussed.

Q. Well, you are equal partners, were you not?

A. Yes, but how we divided the money would be between us.

Q. Did you hear Mr. Humphries' testimony to the effect that your average daily running inventory approximated \$4,000?

A. Yes.

Q. Do you agree in that estimate? [534]

A. I don't know as much about prices as he would but I know we had a large amount of stock there.

Q. Then, it is your testimony that approximately a month after you acquired a full partnership interest in the firm you had an opportunity to sell it for \$9,000 plus inventory and you never asked Mr. Blackard if he would consent to that sale?

A. I didn't talk to Mr. Blackard personally.

Q. Were you eager to make the sale?

A. We would have liked to have straightened it out and that seemed to be the easiest way through a sale.

Q. Did you testify that the reason the sale had not gone through was because Blackard had refused to consent?

A. Yes.

Q. Is there any other reason that you can recall?

(Testimony of Marvin Campbell.)

A. That was what hinged upon the sale that it was agreeable to all parties. He didn't want to get into something where there was any antagonism at all and it was agreeable with all parties, well, he would take it over.

Q. So that was the reason that the sale fell through, was it? A. Yes.

Q. Did you hear Mr. Humphries' testimony that he had paid Clyde Graves \$2500 for that business at the first part of February, 1948?

A. Yes. [535]

Q. From your familiarity with the books of the business, do you know whether that is the figure that was reflected by those books?

A. I believe that is what he paid. I had several long talks with Clyde Graves myself, not in connection with the restaurant, but just as a landlord.

Q. Do you know whether that \$2500 was for the business outside of inventory or whether it included the inventory?

A. As far as I know it was for equipment.

Q. And no inventory was included so far as you know?

A. So far as I know there was no inventory in it.

Mr. Cottis: No further question.

The Court: Any further direct examination?

Mr. McCutcheon: No further direct examination.

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Campbell.

Mr. McCutcheon: Call Mr. R. E. Hilgilen.

R. E. HAGLE

called as a witness on behalf of plaintiffs, being duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. Will you state your name, please?

A. R. E. Hagle. [536]

Q. What is your occupation?

A. Drive a cab.

Q. For whom do you drive cab?

A. Now I am driving a Red Cab.

Q. Where were you employed during the months of March, April and May, 1948?

A. Driving for Hy's.

Q. And who was your employer?

A. Frank Jones.

Q. Did you ever have occasion to make a trip to Wasilla for moose meat during the months of March, April or May?

Mr. Cottis: May it please the Court, I would like to suggest that the witness be warned about self-incrimination, Your Honor.

The Court: Yes, quite right. Mr. Hagle, under the Constitution of the United States and the laws

(Testimony of R. E. Hagle.)

of the United States you are not obliged to answer any question if the answer may incriminate or degrade you. If you are asked a question and it appears that the answer may render you subject to criminal prosecution you may rightly refuse to answer upon that ground, but you have to state the ground now, that is, the ground that your answer will incriminate you. Nobody can take this exception for you. So to make that exception for you you must make it yourself. So, if in your honest judgment the answer to the question counsel propounded to you may incriminate you you may [537] decline to answer.

Mr. McCutcheon: Would the Court advise the witness that the case on trial is of a civil nature?

The Court: The case on trial is a civil case in which Vernon Humphries and Marvin Campbell are plaintiffs and Laurence Starns and Joe Blackard and a third man, Glen Phillips, are defendants. This is a civil case. But the question asked you concerning moose meat is such that I do not know and perhaps you do not know whether your answer may conceivably lead to a criminal prosecution against you, not in this case but a criminal prosecution.

I am not inviting you to decline to answer, but I want to tell you about your Constitutional rights so that you can decline to answer if you honestly believe that your answer may incriminate you. Do you wish to answer that question?

(Testimony of R. E. Hagle.)

Mr. McCutcheon: Let me re-state the question, if the Court please. I will withdraw that question and ask a different one at this time.

Q. What is your name, Mr. Hagle? You stated your name when I first asked you and I didn't catch the name you gave to the Clerk?

A. R. E. Hagle.

Q. Is that your true name?

A. That is the name they have on subpoena but that is not my true name. [538]

Q. What is your true name?

A. Eldon Helgelien.

Q. Mr. Helgelien, during the months of March, April or May did you have occasion to make a trip to Wasilla? A. Yes, I did.

Q. And at whose request did you make that trip?

A. Well, I just had a call from the stand to go to the Panhandle and I picked up a native there and we went to Wasilla.

Q. And what did you do in Wasilla?

A. Well, this native picked up some meat.

Q. And put it in the car, did you?

A. Yes, he did.

Q. And you brought it back to Anchorage, did you? A. Yes.

Q. And where did you deliver the meat?

A. Well, we came back to town and we stopped in back of the Panhandle and from there, why, this native and I went down to, I guess it was, Vern

(Testimony of R. E. Hagle.)

Humphries' house and this native he unloaded the meat.

Q. And did you help the native unload the meat or did he unload it?

A. He unloaded it. I never touched the meat.

Q. Now, did you make a stop at the cab stand over at Hy's Cab Stand on the way down to Vern Humphries' house?

A. I don't remember now. I didn't think I did, but I wouldn't [539] say for sure whether I did or not, it has been——

Q. Do you remember seeing Frank Jones on your way back from Wasilla from the time you left Wasilla and the time the meat was deposited at Vern Humphries?

A. Well, I couldn't say whether I saw him or not; it has been quite a while ago, I don't remember.

Q. Do you remember having a discussion with me last evening? A. Yes, I do.

Q. And did you or did you not at that time last evening say that you did not see Frank Jones at any time?

Mr. Cottis: I object to counsel testifying, Your Honor.

The Witness: Well, I don't remember.

The Court: Wait until the Court rules on the objection. Objection is overruled, you may answer.

Q. (By Mr. McCutcheon): Did you or did you not last evening in your cab with myself present in response to a question put by myself to you as

(Testimony of R. E. Hagle.)

to whether or not you saw Frank Jones at the cab stand and pointed out the moose meat to him, did you not at that time say that you did not see Frank Jones?

Mr. Cottis: Object, Your Honor, he is going into collateral issues and he is trying to impeach his own witness; also he is testifying.

The Court: Overruled.

The Witness: I don't—stopping, I don't think I did. [540]

Q. (By Mr. McCutcheon): Your testimony is now, is it not, Mr. Hagle, that you did not see Frank Jones, was that——

Mr. Cottis: Object, Your Honor, it is a leading question.

The Court: Overruled.

Q. (By Mr. McCutcheon): Is that your testimony now that you did not see Frank Jones?

A. Well, I don't remember of seeing him.

Q. How long did you stop behind the Panhandle premises?

A. Well, I couldn't say now, I was there a little while, a few minutes.

Q. Did the native go in the Panhandle?

A. Yes, he did, he was out of the cab.

Q. You remained around the premises, did you?

A. Yes.

Q. Do you know whether or not the native took some meat out of your car at that time?

Mr. Cottis: Objection as being——

The Court: Overruled.

(Testimony of R. E. Hagle.)

The Witness: No, I don't.

Q. (By Mr. McCutcheon): You don't know whether he did or not, is that correct?

A. No, I don't know whether he did or not.

Q. And from there you went to Vern Humphries' house, did you? [541] A. Yes.

Q. And did you ever talk to Vern Humphries about this moose meat?

A. No, I have never talked to Vern.

Q. Did you know whether or not it was moose meat?

A. No, I didn't know it was moose meat.

Q. You looked at the meat, didn't you?

A. I saw him when he loaded it, yes.

Q. Was there any hair on it?

A. No, it just looked like ordinary meat to me.

Q. I want the answer to that question once more—was there any hair on the meat? A. No.

Q. Did it look the same as any other meat?

A. It looked like ordinary meat to me.

Q. Did you ever find out it was moose meat?

The Court: You are asking for hearsay testimony?

Mr. McCutcheon: Yes, Your Honor. I withdraw the testimony.

Q. Were you ever paid for that trip?

A. No.

Q. Had you ever made a similar trip at any other time? A. No.

Q. Had you ever discussed it with Mr. Humphries at any time?

(Testimony of R. E. Hagle.)

A. No, I never. I was working for the company there. [542]

Q. Had you ever discussed it with Mr. Campbell? A. No.

Q. And you were not paid for the trip, did you say? A. No.

Q. Do you remember how much the charge was?

A. No, I don't remember now, I was working for the company.

The Court: Trial will be suspended at this time. We have another matter at one o'clock. Ladies and gentlemen of the jury, you will be excused until two o'clock and the trial will be resumed then although the Court will reconvene at one. During your absence from the Court room you will not talk about the case or listen to any conversations about it or form or express an opinion until it is finally submitted to you.

Court now stands in recess until one o'clock.

(Whereupon, at twelve o'clock noon, the trial was recessed until two o'clock the same day.)

Afternoon Session

The Court: Clerk may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, Your Honor.

R. E. HAGLE

previously called as a witness in behalf of plaintiffs, having previously been sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. McCutcheon:

Q. Mr.——

Mr. Cottis: May it please the Court, I want to object to any further testimony at this time about the moose meat incident on grounds it might be proper rebuttal testimony but not properly part of the plaintiff's principal case. In other words, Your Honor, if the defendant in its defense introduces evidence of a moose meat possession then I can see that this would be fair rebuttal testimony.

The Court: Well, perhaps counsel is right but we have gone so far down to the end of the road that I think that we will have to proceed and treat it as evidence in plaintiff's case in chief and the objection of defendants is overruled.

Mr. McCutcheon: I would like to also submit, Your Honor, that counsel offered a notice that contained in that notice the charge——

The Court: Isn't that a matter of argument to the jury? [544]

Mr. McCutcheon: Well, it was read to the jury as I remember.

The Court: That is what I say, it is matter of argument to the jury and I have already ruled that the evidence is admissible at this time.

(Testimony of R. E. Hagle.)

Mr. McCutcheon: Yes, sir.

Q. Mr. Hagle, when you came from Wasilla you went to the Panhandle, did you? A. Yes.

Mr. Cottis: Objected to as leading, Your Honor.

The Court: Overruled.

Q. (By Mr. McCutcheon): Did you go to the Panhandle? A. Yes.

Q. To the rear entrance? A. Yes.

Mr. Cottis: Objected to as leading, Your Honor.

The Court: I realize the circumstances which may make leading questions proper but I wish counsel would try to avoid leading questions. It is a poor practice unless absolutely necessary under one of the exceptions.

Mr. McCutcheon: Well, the witness has been surprisingly cooperative, I realize, Your Honor. Well, all right.

Q. Now, how long did the Indian remain in the Panhandle? [545]

A. I couldn't say now, I don't—it has been quite a while. I don't know how long he stayed in there.

Q. How good is your memory with respect to that incident?

A. Not too good, it has been quite a while ago.

Q. Can you remember the Indian's name?

A. No, I don't even know his name.

Q. What did he look like?

(No response.)

Q. Can you describe him?

A. Just looked like another native to me, I couldn't describe him.

(Testimony of R. E. Hagle.)

Q. Was he a tall native or a short native?

A. Just like the average of them.

Q. Was he lean or heavy?

A. Oh, I don't know, I suppose about medium built, just about like most of the natives you see.

Q. Did you see anyone else present at that time?

A. No, he went in the Panhandle and he came out and we left.

Q. Was anyone with him when he came out?

A. Oh, not that I know of.

Q. Do you remember now whether or not Joe Blackard was with him when he came out to your car?

Mr. Cottis: Objected to as leading, Your Honor, the witness has already answered the question.

The Court: Overruled. [546]

Q. (By Mr. McCutcheon): Do you remember whether Joe Blackard was with him when he came out to your car?

A. I wouldn't say, all I saw was this native.

Q. Could Joe Blackard have been with him when he came out to the car?

Mr. Cottis: Object as leading.

The Court: Overruled.

The Witness: I couldn't say.

Q. (By Mr. McCutcheon): Did you have a conversation with Joe Blackard at that time?

A. No.

Q. Are you positive about that?

Mr. Cottis: Objection, Your Honor, as leading.

(Testimony of R. E. Hagle.)

The Court: Overruled.

The Witness: No, I never had any conversation with Joe.

Q. (By Mr. McCutcheon): Are you sure whether or not you saw him at that time?

A. No, I don't believe I did.

Q. Do you recall a conversation in your home on June 21st when Mr. Humphries and myself visited you there?

A. Yes, I remember coming down, I don't know the date.

Q. Did you not on June 21st—on or about June 21st—at your home here in Anchorage, Alaska, in the presence of myself and Mr. Humphries, in response to a question as to whether or [547] not you saw Joe Blackard there, you said, “Yes, Joe Blackard——”

Mr. Cottis: Objection, Your Honor, counsel is testifying. Also I would like to know what year this conversation occurred?

The Court: Overruled.

Q. (By Mr. McCutcheon): Did you or did you not in the presence of Mr. Humphries and myself at your home here in Anchorage, Alaska, on or about June 21st, this year, in response to a question put to you by myself, did you not at that time and place say that you saw Mr. Blackard come out of the Panhandle with the Indian and that he told you to deliver the moose meat to Vern Humphries' house, did you or did you not at that time and place make that statement?

(Testimony of R. E. Hagle.)

A. I don't believe I said anything about Joe Blackard. I said the native came out and that is the only one I remember of was the native.

Q. Did you or did you not make the statement that Joe Blackard came out with the native and told you to deliver the moose meat to Vern Humphries' house, did you or did you not make that statement?

Mr. Cottis: Objection, Your Honor, counsel is arguing with the witness and the question has been answered once.

The Court: Overruled.

The Witness: I don't believe I did. I said I saw this native, it was the only one that came out that I know of. [548]

Q. (By Mr. McCutcheon): Do you recall a discussion with me in the witness room ten minutes ago? A. Yes.

Q. At that time did you not say as follows: "Joe Blackard could have come out there; I could have said that to you down there at the house, I don't remember too well because I was sleepy," did you not make that statement a few moments ago?

A. I said I don't know for sure who came out. The only one I saw was this native and I couldn't say whether there was anyone——

Q. Did you or did you not make this statement that I have just repeated? Did you or did you not make that statement in the witness room ten minutes ago?

Mr. Cottis: May it please the Court, this testi-

(Testimony of R. E. Hagle.)

mony on the part of counsel over repeated denials by the witness is bound to lead the jury to believe that some such statement was made and I ask that counsel be cautioned not to use this method. It is prejudicial.

The Court: No, the questions may be asked and the jury is instructed now and will be instructed in the written charge that because a question is asked and the witness denies it and says no, the fact of the asking of the question is no indication whatever that the statement embraced in the question is factual or correct or true. In other words, it is your duty not to be [549] prejudiced or biased by the asking of questions. Your duty is to determine the credibility of the witness, in other words, what witness or what part of the testimony of any witness is true and what part may not be in harmony with fact. Counsel in the meantime has the right to ask the question.

Mr. Cottis: May it please the Court, if counsel could show that this witness was hostile I would not be prevailing in my objection.

The Court: Was this not the witness for whom bench warrant was issued yesterday?

Mr. Cottis: I don't think, Your Honor, but there is no——

Q. (By Mr. McCutcheon): Were you arrested by a bench warrant yesterday, Mr. Hagle?

A. Was last evening, yes.

The Court: It seems evident to me that counsel

(Testimony of R. E. Hagle.)

has a right to—within moderation—to use leading questions and under the law he has the right to put impeaching questions to any witness hostile or not, that is the right the law gives, a witness may be asked whether on another occasion he has or has not said something which is not in harmony with his testimony he has given on the stand. Any witness may be so interrogated.

Mr. Cottis: I object to it on direct examination.

The Court: That is the time it frequently comes in—on cross as well as direct examination. The objection is overruled.

Q. (By Mr. McCutcheon): Mr. Hagle, do you remember our having a conversation in the witness room about 20 minutes ago?

A. Yes, we had a conversation in the witness room.

Q. At that time and place did you not state in response to a question put by me as to whether or not at your home on or about June 21st you said Joe Blackard accompanied the Indian out to the car and told you to deliver the moose meat to Vern Humphries? Did you not in the witness room say, "I could have said that out at the house, I don't remember, I was sleepy, you just woke me up." Did you not make that statement in the witness room?

A. Well, yes, but I don't remember.

Mr. Cottis: May it please the Court, I just dislike ever so much harping on this but counsel now is going into a secondary collateral matter. He is

(Testimony of R. E. Hagle.)

trying to impeach the witness for saying something about a conversation on June 21st. I mean he is two degrees removed from anything at issue at this time and I object on that ground.

Mr. McCutcheon: May I be heard before the Court rules?

The Court: I am going to overrule the objection so there is no need for counsel——

Mr. McCutcheon: I would like to submit the law.

The Court: Well, the Court has already ruled.

Mr. McCutcheon: Very well, sir.

The Court: ——in favor——

Mr. McCutcheon: I am afraid the jury might somehow get [551] the impression that I was taking advantage of the witness or doing something that I am not entitled to do.

The Court: The Court has ruled you have the right to ask the question but the Court does warn the jury that the asking of the questions is no indication that what is embraced in the question is a fact.

Mr. McCutcheon: For counsel's information he may find this privilege——

The Court: Wait.

Mr. McCutcheon: I was about to refer counsel to Section 58-4-59 where he can find my right to ask the witness this question.

The Court: Proceed with the examination.

Q. (By Mr. McCutcheon): Did you or did you not make that statement at the time and place just mentioned?

(Testimony of R. E. Hagle.)

The Court: I think he has already answered that.

Q. (By Mr. McCutcheon): Well, did you or did you not make such an answer to my question in the witness room?

A. Well, I said I couldn't say for sure, the only one that I saw that had was the native that I remember of.

Mr. McCutcheon: Your witness.

Q. Have you talked to anyone about this case?

A. No. [552]

Q. No one at all? A. No.

Q. Well, you talked to me, didn't you?

A. Well, I talked to you, yes.

Q. Did you talk to Mr. Jones?

A. No, I haven't talked to Frank.

Q. Have you seen him?

A. I saw him in the witness room is all this morning.

Mr. McCutcheon: Your witness.

The Court: Counsel for defendants may examine.

Cross-Examination

By Mr. Cottis:

Q. How many times have you discussed this with Mr. McCutcheon?

A. Well, he was down at my house one day and I talked to him right here in the witness room today, probably two or three times.

Q. You talked with him last night, did you?

(Testimony of R. E. Hagle.)

A. Yes, I talked to Mr. McCutcheon.

Q. Where was that?

A. At his house.

Q. At Mr. McCutcheon's house? A. Yes.

Q. How long did you talk with him last night at his house?

A. Well, just a few minutes, probably maybe five minutes, three or four. [553]

Q. And then there was some conversation on June 21st, was there?

A. Well, there was a little; there wasn't much; he came up while I was sleeping.

Q. What year, this year or a year ago?

A. Yes, this year.

Q. At this time that you mentioned that you went to Wasilla with the native, can you recall whether that date could have been nearer the 1st of April or nearer the 11th of April?

A. I don't remember what date that was.

Q. You can't remember now which of those two dates it might have been nearer to?

A. I wouldn't know now.

Q. Mr. Hagle, how long did you drive for Hy's Cab?

A. It must have been about four months, I guess.

Q. That was during the late winter and spring of 1948? A. Yes.

Q. During that period did you ever know Joe Blackard to charter a Hy's Cab?

(Testimony of R. E. Hagle.)

A. Well, I couldn't say, he never chartered mine.

Q. You never knew of his having chartered any?

A. No.

Q. Do you know of Glen Phillips ever having chartered a Hy's Cab?

A. Not that I know of, no. [554]

Q. Did you know of Larry Starns ever having chartered a Hy's Cab?

A. No, not that I know of.

Q. Do you know of Vern Humphries ever having chartered a Hy's Cab?

A. Not that I know of, I don't know if he has or not. He has never chartered mine.

Q. Do you know of Marvin Campbell ever having chartered a Hy's Cab? A. No.

Q. Didn't Humphries charter the cab for this trip to Wasilla?

A. Well, I had this native. The native, I figured, was my charter. I figured he was the one.

Q. Did you ask the native to pay your fare?

A. Yes.

Q. What did the native say?

A. Didn't have no money.

Q. Did he deny his liability for the fare?

(No response.)

Q. Did he claim that he didn't owe you any money?

A. Well, I don't know, I just asked him for money, told him the company wanted some money and he said he didn't have any, so——

(Testimony of R. E. Hagle.)

Q. Did the native tell you where he was going to get his money from? [555]

Mr. McCutcheon: Objected to, calls for hearsay testimony.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Did the native make any promise about when he would pay you?

A. No, never.

Q. No, never made any promises, is that what you said? A. Yes.

Q. About what time was it when you got back to Anchorage, if you can remember, Mr. Hagle?

A. I don't know the exact time. It was late in the afternoon.

Q. And did you then park your cab behind the Hy's Cab Stand?

A. Not that I remember of, we stopped at the Panhandle and then from there I went on down to where this native took the meat.

Q. When you stopped at the Panhandle the native went into the Panhandle, is that correct?

A. Yes.

Q. But you did not, is that right?

A. No, I stayed in the car.

Q. Can you remember how long the native was in the Panhandle?

A. I don't remember how long he was in there.

Q. Did he go in the front entrance or the back?

A. He was in the rear.

Q. That is, from the alley?

A. Uh huh. [556]

(Testimony of R. E. Hagle.)

Q. Was he in there as long as an hour, do you know—do you think?

A. Oh, no, it was a matter of minutes, I couldn't say for sure but it wasn't too long.

Q. And when he came out he was alone?

A. As far as I can remember he was.

Q. Did he get back in the cab? A. Yes.

Q. And then where was it that you went?

A. Well, I couldn't say for sure, I don't believe we made any more stops. I believe we went down to where he unloaded the meat then.

Q. Where was it he unloaded the meat?

A. It was at Humphries' house.

Q. Had you ever been to Humphries' house before? A. No.

Q. Were you ever there after that?

A. No.

Q. When he unloaded the meat was it dark?

A. Yes, it was dark.

Q. Were there lights on in the house?

A. This house was lit up.

Q. Was there a car parked at the house?

A. I don't remember whether there was or not.

Q. Did you get out of your taxi at all at that time? [557] A. Oh, I was out.

Q. Where had the meat been in the taxi?

A. Where had it been?

Q. Yes, in what part of the taxi.

A. I put it in the trunk.

Q. It had been there in the trunk all the way down from Wasilla, had it? A. Yes.

(Testimony of R. E. Hagle.)

Q. How long do you think you were at Humphries' house altogether?

A. I couldn't say for sure, while he unloaded the meat.

Q. Did you have to get out and unlock the trunk to aid the native to unload the meat?

A. The trunk wasn't locked I don't believe.

Q. Did you have to get out and help the native anyway?

A. No, I never handled the meat at all.

Q. Where did the native leave the meat?

A. Pardon?

Q. Where did the native put the meat?

A. Well, he carried it up to the house, I don't know where he put it.

Q. Did he go in the door of the house?

A. Well, I believe he did.

Q. You believe he did not?

A. I believe he did, it was kind of a porch there or something, [558] if I remember.

Q. I am sorry, I just didn't get your answer, did you think the native went inside or not?

A. I believe he did, he took the meat out of the cab and there was a porch there on the house or something and he was in there.

Q. Was that on the front of the house?

A. Well, it was at the doorway there, I imagine it was the front.

Q. Had the native pointed the house out to you when you were driving him to the house?

A. Yes.

(Testimony of R. E. Hagle.)

Q. He said, "There is Humphries' house now," or something like that?

A. I didn't know where Humphries' house was.

Q. The native gave you directions for how to get there?

A. Yes, he was the one who had the cab. He showed me where to go.

Q. Well, did he say that it was Humphries' house or did he just say that it was a house he wanted to go——

A. Well, I didn't know for sure whose house it was but I found out it was Humphries' house, the native told me later.

Q. Who told you later? A. Native.

Q. The native mentioned Humphries' name?

A. Yes, he knew his name. [559]

Q. Did the native mention Marvin Campbell's name? A. Not that I know of, no.

Q. And where was this house, do you recall?

A. It was down over the hill on Fifth Street, I don't know the right address.

Q. In the vicinity of N Street?

A. Well, it is on either N or M or O, one of them.

Q. And did you testify that you later determined that that was Humphries' house?

A. Well, yes, it was Humphries' house.

Q. How did you find out it was Humphries' house?

A. Well, this native told me later when we went uptown that that was Humphries' house.

(Testimony of R. E. Hagle.)

Q. Where did you finally drop the native, do you remember?

A. I just dropped him uptown, it was between C and D Streets.

Q. Had you ever seen him before that you know of? A. No.

Q. How long, as nearly as you can recall, was it from the time you picked the native up at the Panhandle until your returned from Wasilla to Anchorage, in other words, when you entered the City limits coming back from Wasilla?

A. Will you repeat that again, please?

Q. Let me rephrase it. Do you recall about what time of day it was that you left Anchorage with the native to go to Wasilla?

A. It was in the morning, I don't know the exact hour. [560]

Q. Middle of the morning?

(No response.)

Q. Awfully early in the morning?

A. It wasn't too early; it was sometime in the middle of the forenoon.

Q. And do you recall about when you got back from Wasilla?

A. I couldn't say for sure but it was late in the evening.

Q. Had you ever seen the native before that you remember? A. No.

Q. Have you ever seen him since?

(Testimony of R. E. Hagle.)

A. I have never seen him.

Q. Have you discussed this case with Mr. Humphries? A. No.

Q. When you were subpoenaed was a witness fee paid to you? Was some money paid to you?

A. They paid me for one day when I sat here.

Q. How much was paid to you?

A. For sitting here.

Q. When they handed you a subpoena how much money was given to you?

A. Well, I got ten dollars for sitting here this day for losing my time in the cab stand.

Q. \$10?

(No response.)

Q. Who was it that gave that to you? [561]

A. McCutcheon.

Q. You have never discussed this case with me, have you? A. No.

Mr. Cottis: No further questions.

The Court: Have the jurors any questions?

(No response.)

The Court: Counsel for plaintiffs, any further redirect examination?

Mr. McCutcheon: Yes, Your Honor.

Redirect Examination

By Mr. McCutcheon:

Q. You say the native told you it was Humphries' house later on? A. Yes.

(Testimony of R. E. Hagle.)

Q. You remember that distinctly, do you?

A. Well, he told me sometime when I had him that it was Humphries' house after we left there.

Q. Do you remember that distinctly?

A. Well, I believe he told me that was Humphries' house.

Q. Do you remember that distinctly?

A. Well, yes.

Q. Now, do you remember distinctly whether or not Mr. Blackard came out with the native to the car? How is your memory on that point?

A. Well, I say I don't know whether he was with him or not. [562]

Q. You don't remember that part?

A. The only one I remember seeing is the native during the whole trip.

Q. Could Mr. Blackard have come out to the car with the native?

A. He could have walked out.

Q. And you do not remember it now?

A. It was dark then and the native got in the cab and I left.

Q. What was the native's name? I believe you answered you didn't know, do you?

A. I don't know his name.

Q. And you don't remember what he looked like, just like another native?

A. Just like an ordinary native to me.

Q. And you asked him for the fare, did you?

A. Well, I asked him if he was going to pay the fare and he said he didn't have no money.

(Testimony of R. E. Hagle.)

Q. And you had made a trip clear to Wasilla, hadn't you? A. Yes.

Q. How much would the fare have been?

A. Well, I don't know exactly how much it was, I was driving a company car.

Q. Well, do you have any idea what the fare was?

A. Well, it would have been pretty high, that it quite a way up there.

Q. How good is your memory on that point, how much did you [563] ask him for?

A. I just asked the native if he was going to pay for the trip and he said "No."

Q. Did you ask him for a certain amount or just ask him if he was going to pay for the trip?

A. I asked him if he had any money.

Q. And what did he say?

A. He said "No."

Q. Now did you ask him for the fare?

A. I just asked him if he had any money for the trip and he said, "No, I don't have any money."

Q. You didn't ask him for a sum certain?

A. No, because I didn't know what the fare would be.

Q. You expected he to pay the fare, didn't you?

A. Yes.

Q. You testified that he was your charter, didn't you? A. Yes.

Q. Now, do you know his name?

A. No, I don't know his name.

Q. Did you write it down anywhere?

(Testimony of R. E. Hagle.)

A. No.

Q. Well, didn't it occur to you that you might hope to get your money sometime after that?

A. Well, I just know him by sight is all.

Q. Did you expect to see him again? [564]

A. Well, I thought I would.

Q. Had you ever seen him before that time?

A. No.

Q. You said he looked just like another native, didn't you? A. Yes.

Q. How did you expect to recognize him again?

A. Well, I suppose if I saw him on the street I could maybe recognize him.

Q. And you didn't write his name down anywhere? A. No.

Q. Did you tell Mr. Jones that you had forgotten his name?

A. Well, I told Frank, "I haven't got the money," and Frank said he would see about it.

Q. Now, did you pick up a passenger on your way back from Wasilla?

A. He picked up two of his little kids.

Q. Who? A. This native.

Q. Were they with you all the time?

A. No.

Q. Where did you drop them off?

A. They left when we stopped back of the Pan-handle.

Q. Was there any charge made for hauling the children?

(Testimony of R. E. Hagle.)

A. No, there was his wife and there was two kids. I imagine it was his wife, it was a woman we picked up on the road. [565]

Q. Did he have the car on charter?

A. It was supposed to have been.

Q. What was charter time?

A. \$6 an hour.

The Court: How much an hour, sir?

The Witness: \$6.

Q. (By Mr. McCutcheon): Were you stopped out at the MP gate? A. No.

Q. You drove right through the MP gate?

A. I stopped and they asked me where I was going and I said Anchorage.

Q. Was there any inquiry made about moose meat there? A. No.

Q. If Mr. Jones stated that you stopped at the MP station and you had a close call would he be testifying truthfully or falsely?

A. I came through like I do any other time.

Q. Mr. Jones testified that you were stopped at the MP gate and you had a narrow escape on the moose meat there, was Mr. Jones testifying truthfully or falsely?

Mr. Cottis: Objection, Your Honor, it asks for a conclusion.

The Court: Objection is sustained. [566]

Q. (By Mr. McCutcheon): Did you ever make any effort later on to collect your money?

A. Well, Frank said he would collect it.

(Testimony of R. E. Hagle.)

Q. So you forgot about it, did you?

A. Yes.

Q. Well, how are you paid—out of the fare or does Mr. Jones pay or did Mr. Jones pay?

A. Supposed to get a certain per cent.

Q. Then you wouldn't be paid unless you collected it from the Indian, is that correct?

A. Yes.

Q. But you were satisfied when Mr. Jones said he would collect it, is that correct?

A. Well, if we couldn't collect he would collect for us on company car.

Q. Did you think at that time that Mr. Jones knew who the Indian was and could collect it?

A. Well, I thought he did.

Q. Did you think he did?

(No response.)

Q. And what caused you to think he knew the Indian?

A. I had just started driving; I hadn't driven there very long. I hadn't been driving very long.

Q. Was there an opportunity to take some of the moose meat out of the cab when you were parked behind the Panhandle? [567]

A. There could have been if somebody got in the trunk.

Q. Do you know whether or not they did?

A. No, I don't.

Q. Well, is it because you don't remember or you remember distinctly that they didn't?

(Testimony of R. E. Hagle.)

A. I don't know whether they did or not.

Q. You don't remember?

A. Yes, well I don't know whether anyone got in the trunk or not.

Q. You would remember it if they did, wouldn't you?

(No response.)

Q. Or would you?

A. Well, if they were in there I probably would remember it, but as I said I don't know whether anyone got in the trunk or not.

Q. You say you would probably have remembered it?

(No response.)

Q. You wouldn't definitely remember it, is that correct?

A. I don't know if anyone got in the trunk or not.

Mr. McCutcheon: No more questions.

The Court: Any further questions?

(No response.)

The Court: Mr. Hagle, please appear in Court on Friday, July 8th, at about two o'clock in the afternoon. It appears that you did not respond to a subpoena and it is proper for [568] the Court to look into that and I will inquire into it at that time. That is all.

Mr. McCutcheon: Plaintiff rests.

The Court: Plaintiff rests. Is there any need for keeping Mr. Hagle in attendance here?

Mr. Cottis: None so far as I am concerned.

The Court: You may be excused and report on Friday, July 8th, at two p.m.

Mr. Hagle: Right here?

The Court: Here in the Court room, yes, sir. Defendant may call a witness.

Mr. Cottis: Your Honor, I would like to make a rather serious motion, so far as I know I shan't say anything that will influence the jury but I leave it up to Your Honor's discretion. It would be rather prolonged, I am afraid.

The Court: I think maybe the jury had better retire to the jury room for a little while.

Counsel may proceed.

Mr. Cottis: Your Honor, because of the elaborate testimony I am afraid that the issues in this case might have been submerged a little. I am moving now for either an instructed verdict or for judgment for the defendants, and I should like to call the Court's attention to the Complaint in this action. It is an equitable proceeding and the issue that it raises is whether Humphries and Campbell are entitled to possession of the [569] premises. They ask for incidental damage relief both punitive damages and actual damages, but those damages and their right to the damages hinge primarily on their right to possession of the premises.

There is no allegation in the complaint that by any stretch of the imagination can be considered

a claim of breach of contract or damages from breach of contract. It is entirely a right to quiet and peaceful possession that is alleged.

Now I submit to the Court that the contract which is in evidence whether it is in the form that it appears in Plaintiffs' Exhibit 1 or whether it is in the form that appears in Plaintiffs' Exhibit 2 and 3. That in any event the contract is a mere license agreement and concession agreement combined. It lacks at least one of the essentials of a sublease in that it fails to define what space the plaintiffs are entitled to.

On Plaintiffs' Exhibit 1 the contract simply refers to a restaurant that is going to be moved somewhere. And Plaintiffs' Exhibits 2 and 3 refer to a restaurant and equipment that is to be moved 18 feet southerly, approximately. In either case it is not a sublease because it fails to define the premises and it fails to give any right to storerooms. It fails to state that the kitchen will be operated at 24 hours a day. And either version of the contract has in it a provision that Blackard can terminate the contract by written notice delivered 24 hours in advance of the effective date of termination. Now [570] there is no denial by the plaintiff and there is no dispute that such a notice was delivered.

The issues that are clouding the matter for the jury right now is whether that termination notice was just, whether there were actual defaults on the part of the plaintiffs and whether Blackard was right in trying to terminate it for the—for grounds

set out there. But I submit, Your Honor, that from the nature of the agreement Blackard had the right to terminate it and if he was wrong in serving a termination notice the plaintiff's proper remedy is an action for breach of contract and for damages, for failing to deliver the termination notice under the circumstances outlined in the contract. But breaching his contract by delivering the termination notice under other circumstances. But those are the issues that we are getting into on this case—is whether the substantive matters set forth in that notice were true or not, whether there was illegal meat and whether Humphries had paid the monthly fees he was supposed to have paid, whether the bond provision was to have been waived. That is the type of issue we have been getting testimony on and I submit that those issues are not consistent with the pleadings.

The pleadings are not a breach of contract affair, yet those issues obviously loom large in the jury's mind because we have spent so much time on them.

Now the actual complaint states as amended—includes [571] these things that plaintiff expended large sums of money in the construction of counter upon the said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business, including ranges, stools and other necessary fixtures and equipment. No evidence at all has been introduced of the money spent on construction of a counter, and as to the equipment counsel for the plaintiff promised to

connect up that testimony and I submit he has not done it.

There has been no allegation that the equipment was not returned to the premises as is provided by Plaintiffs' Exhibits 2 and 3 and under Plaintiffs' Exhibit 1 the equipment would not have to be returned to the plaintiffs.

But even if there were such proof and even if the complaint said that they had failed to return the equipment, which it doesn't, even then the proper action would be for breach of contract that Blackard had failed to comply with the terms of the contracts and had failed to return the equipment, so even then the complaint should be dismissed.

Now the next matter for complaint in the complaint is that the defendants have maliciously, wilfully and wantonly interfered with plaintiffs' business, resulting in great loss of profits to plaintiffs.

Now, all the testimony that the plaintiffs have come in—not a scintilla but every part of it has been to the effect that the gross receipts ran fairly constant over the three months in [572] the \$3,000 neighborhood and the undisputed testimony of theirs is that the purchase price at the beginning on February 4th was \$2500, that in May when they quit the premises the purchase price offered them was \$9,000.

And they say, and again it is going to cloud things for the jury, they say that Blackard interfered with that \$9,000 sale. Well, again, if Blackard interfered with that \$9,000 sale that is a matter for another complaint, it is not set out in here. There

is no talk of that and there is no allegation that Blackard interfered with any sale in this complaint.

Now, the next matter in here that the plaintiff's complain about is that on the 20th day of April, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof. Now, what of it, Your Honor? If they admit, as all the evidence shows, that this termination notice was served on April 15th and that it purported to terminate the agreement on 24 hours' notice, and, if, as I say, their only remedy is not to ignore the termination notice but to sue Blackard for breach of contract for serving a termination notice when he wasn't justified in serving it. So it makes no difference what happened on the 20th day of April, 1948.

The next item is that the defendants have refused and neglected to provide plaintiffs light, heat and water for said restaurant business as required by said agreement, all to the [573] plaintiffs' damage in the sum of \$575. No evidence of any \$575 light, water or heat bill was put in. The only evidence put in was a cancelled check payable to the City of Anchorage of \$240 for deposit, which presumably was returned. But in any event the word "Agreement" considered as a restaurant agreement it was not intended to include fuel for stove.

The next, that the plaintiffs—that the defendants have maliciously, wilfully and unlawfully operated

gambling games interfering with and otherwise being detrimental to plaintiffs' business. Now there is a scintilla of evidence on that point that any card games operated were detrimental. Mr. Humphries so testified, other witnesses have not and there is that scintilla of evidence that card games were detrimental, but when it comes to backing it up with figures we are faced with the undisputed testimony that the business in March, April and May, each month, was in the neighborhood of \$3,000, and that the worth of the business as a sale proposition increased from \$2500 to \$9,000. So there is no damages connected with that thing.

Now, the next one is that the defendants have wilfully and maliciously injured plaintiffs' credit rating much to plaintiffs' damage. Plaintiffs' damage from any alleged credit rating injury has not been shown. Humphries or Campbell, either one, have not shown that they were ever turned down on any credit affair because of something that Blackard had said. [574]

The next one is that on or about the 5th day of May the defendants did with deliberate intent to injure the plaintiffs maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage. There isn't any evidence at all in the plaintiff's testimony about fuel oil.

The next one is on or about the 5th day of May the defendants took possession of the plaintiffs' premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and that plain-

tiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business. That is the same issue as the other one, as long as it was undisputed here that that notice was served on April 15th it can't make any difference what happened on May 5th except in a damage suit for breach of contract and that is the sum total of the allegations in the complaint except for the damages asked and the injunctions asked, and I therefore ask that the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence.

The Court: Mr. McCutcheon?

Mr. McCutcheon: If the Court please, Mr. Cottis contends that according to the testimony there was no sublease and I submit that there was a sublease and that it is material to this argument in that it was for a time less than the lease; that Blackard and Starns had a period of three years, which is in [575] evidence, and that it was subject to termination at a time earlier than that 3-year period which, I believe, is one of the tests of the subleasing. If it was for the total period it might be a partial assignment. It certainly was not a license. A rental was paid—6 per cent of the gross or not less than \$200, which I am sure under the weight of all modern authorities constitutes a rental. Many leases are written along those lines with the percentage of the gross take.

The other issues that counsel has raised, I believe Your Honor can rightfully let the jury decide and I submit that the case is entitled to go to the jury.

Mr. Cottis: Your Honor, with respect to Mr. McCutcheon's statement about the agreement. A criterion of a lease or sublease of course is that the lessee or tenant be permitted to occupy a definite location for almost any purpose, that the purposes be within his control.

Here instead of giving Humphries the right to occupy a specific location for all purposes except, say, gambling or illegal user, the Humphries is restricted to the operation of a restaurant and given no specific location. It is obviously left in Blackard's control. But on whatever space Humphries has he is subject to Blackard's control. If Blackard wanted to move the restaurant upstairs in the premises there is nothing that could prevent him from doing, and that is why it could not possibly stand up as a sublease. [576]

With respect to the notice that was served by Blackard or by the Marshal on Humphries terminating that agreement, four grounds of default are set out in it, two more have appeared here in this case without any dispute at all and there is no requirement in that contract that the notice specify the grounds of default, it is simply a courtesy on Blackard's part.

The other two grounds of default which have appeared undisputed on the plaintiffs' own side of the case: are (1) The contract was assigned from time to time without Blackard's written consent as is required there; and (2) it did not comply with the Federal, Territorial and City laws because

we operated without any restaurant license. So, altogether, there are now six grounds for terminating that.

The Court: The motions are denied and the Jury will be recalled.

Mr. Cottis: Your Honor, may I make a further motion?

The Court: Yes, surely.

Mr. Cottis: I want to make two motions and the argument will be identical. I ask that the complaint be dismissed as to the defendant, Glen Phillips, because no testimony has been adduced showing Phillips' liability and as a second motion I ask that the complaint be dismissed as to Larry Starns because nothing implicates Mr. Starns in this.

The Court: As to Starns there is enough evidence, in my judgment, to go to the jury. I am not certain as to Phillips, [577] but that motion too will be denied at this time. Counsel may renew it at the close of the entire case.

The jury may be recalled.

Without objection the record will show all members of the jury present and the Court will stand in recess until six minutes past three.

(Short recess.)

Mr. Cottis: Call John Brown.

JOHN BROWN

called as a witness on behalf of the defendants, being duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your——

The Court: Without objection the record will show all members of the jury present.

Q. (By Mr. Cottis): Your name is John Brown? A. Yes.

Q. Johnney, were you associated with Clyde Graves in the restaurant at the Panhandle Bar in 1947?

A. Yes, I was, from part of 1946 and '47.

Q. Did you see the Panhandle Restaurant premises after they had been remodeled for Humphries and Havins?

A. Yes, I was in after it was remodeled. [578]

Q. Where you and Mr. Graves operated that restaurant was the equipment adequate?

A. Well, there was more equipment added from the time we went in there than there was when we first went in, but it was bought between Clyde Graves and Charley Hardy that was handled, I didn't have anything to do with getting that equipment. But there was some—the only piece of equipment that I bought that went in there was the stove and that came from Army surplus property.

Q. Now, was any of Graves' equipment not in-

(Testimony of John Brown.)

cluded when Humphries and Havins took over that restaurant?

A. Well, they put some equipment there after I left. I left there in June, and when John Mannis and Clyde Graves were in there they put in some new equipment. I know there was a large meat saw.

Q. That they had put in?

A. They put in. They put in some new stools and they put in—there was quite a bit of cooking utensils like big gunboats and things like that they put in some of those and they had that one large refrigerator there I noticed that they put in there, that was put in there after I left.

Q. After you left but before Humphries and Havins took over? A. Yes.

Q. At the time Humphries and Havins took over was the equipment adequate to operate a restaurant there? A. Well, I guess so. [579]

Q. Did any items that Graves and you or Graves and Mannis had had there, were any of those items not included in the equipment that Humphries and Havins took over?

A. I couldn't say on that count because I don't know, but I know that most any of the equipment that went in there was under the agreement they had with Charley Hardy was to stay, such as when they took—when we took the old stove out and put the new stove in. In other words that belonged to Charley Hardy because removing one stove and replacing the other.

(Testimony of John Brown.)

Q. Now, oh, incidentally, were there any card games operated in there when you and Graves——

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

Q. (By Mr. Cottis): Were any card games operated on the Panhandle premises when you and Graves were operating the restaurant?

A. They played some pinochle there and things like that. I never paid any attention to it myself. I was cooking there most all the time.

Q. Did the games interfere with your restaurant business? A. No.

Q. Johnney, did you have occasion last Saturday to see a refrigerator at Glen Phillip's house?

A. Yes, I was out at Glen's house last Saturday evening, yes.

Q. What kind of refrigerator is it? [580]

A. Frigidaire is the company name on it, I believe Frigidaire.

Q. Had you ever seen the refrigerator before?

A. Yes, it was the one we used down there at the Panhandle all the time we were there.

Q. For how long a period was that?

A. It was there all the time I was there it was there before I was there.

Q. In other words when you went there in 1946 was that refrigidaire there? A. Yes.

Q. And are you sure it was the same refrigid-
aire? A. Yes.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all unless the jurors have some questions?

(No response.)

The Court: That is all, Mr. Brown, you may be excused.

Mr. Cottis: Call Dr. O'Malley.

JAMES E. O'MALLEY

called as a witness on behalf of defendants, having been duly sworn, took the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Dr. O'Malley, you are a duly licensed physician, practicing [581] in the City of Anchorage and have been for some time?

A. That is right.

Q. Do you know the plaintiff, Vern Humphries, sitting in the middle here? A. I do.

Q. Will you spell your name for the Reporter, Doctor?

A. O'Malley, O'M-a-l-l-e-y, James E.

Q. Have you ever treated Mr. Humphries or his family? A. I have.

Q. Did you ever advise Mr. Humphries that his daughter or any of his daughters should be taken outside for treatment?

A. Not to my knowledge.

Q. Do you recall whether Mr. Humphries hurt

(Testimony of James E. O'Malley.)

a finger in March or April of 1948? A. I do.

Q. Did any blood poisoning set in from that wound? A. A finger got infected.

Q. And will you describe the nature of the infection—how long it lasted?

The Witness: Can I testify to that, Judge, or is that privileged communication?

The Court: That is a privileged communication but if Mr. Humphries waives it you may testify.

Mr. McCutcheon: Are you testifying from notes, Doctor?

The Witness: No, I have my records here—some of my [582] records here—and there are some notes on the records.

Mr. McCutcheon: I would like to hear the question repeated again, if the Court please.

The Court: Read the question.

(Question read.)

Mr. McCutcheon: May I have just a moment? We don't wish to make an objection at this time.

The Court: There is no objection. Mr. Humphries waives whatever privilege there may be and you may answer, Doctor. Repeat that question again, please?

Q. (By Mr. Cottis): The nature of the infection that set into his finger?

A. Mr. Humphries sustained an amputation of one of his fingers—the tip of one of his fingers—sometime in March of 1948 and this was treated at

(Testimony of James E. O'Malley.)

Palmer, Alaska, by Dr. Lamberton, who amputated the tip of his finger and sewed it up accordingly. Inasmuch as Mr. Humphries lived in Anchorage and I was taking care of his family, why, he came to me for further treatment. And during the course of his convalescence the finger became inflamed but it readily responded to the usual measures that we use and by the time he left Anchorage sometime in April—last of April, I believe it was—he was practically healed.

Q. At the time he left there was no infection remaining?

A. No, there was no infection remaining.

Q. Did you advise him that he should have his finger treated [583] by medical experts in the States?

A. Not to my knowledge.

Q. And you don't recall ever advising any of his daughters to go outside for treatment?

A. I don't remember that, no. Does this objection—does this waiving of the privilege here cover the daughter?

The Court: I understand the waiver covers all of your testimony. If Mr. Humphries or his counsel wish to object this is the time to do it. You may answer, Doctor, no objection is heard.

The Witness: No, not to my knowledge. The little girl had an infection from time to time but there was no reason for her to go anywhere else for treatment.

Q. (By Mr. Cottis): If you had advised her or

(Testimony of James E. O'Malley.)

Mr. Humphries to go anywhere else would you remember it? A. I most certainly would.

Q. And you are definitely certain you never did give them such advice?

A. I don't believe I did.

Mr. Cottis: Your witness.

Cross-Examination

By Mr McCutcheon:

Q. Did you remove the little girl's tonsils, Dr. O'Malley?

A. Yes, I removed the little girl's tonsils on the first of July—around the 1st of July, 1947, or shortly thereafter. [584]

Q. And what was her general health at that time?

A. Well, I removed the tonsils of the little girl and the little boy and they had been ailing at intervals as children will all winter long with tonsillitis and I took out their tonsils.

Q. What were the little girls' state of health at the time you removed their tonsils——

Mr. Cottis: Objection——

Mr. McCutcheon: Your Honor, that is material.

The Court: Overruled, you may answer.

The Witness: I thought that she would be improved. I didn't think her health was particularly impaired but I thought it might be improved by a tonsillectomy.

Q. (By Mr. McCutcheon): Are you testifying from notes, are you, Doctor?

(Testimony of James E. O'Malley.)

A. No, this is my charge card. I know just when I did this thing. There is nothing remarkable about the two children except they had colds and tonsillitis and I thought they would have no further tonsillitis if I removed their tonsils.

Q. What was the little girl's general state of health following the removal of her tonsils?

A. I think she continued at times to have a little pus in her urine from time to time, which is fairly common in female children.

Q. What was her lung condition at that time?

A. Not particularly remarkable.

Q. Did you have occasion to examine her with reference to her lung condition?

A. Well, I used to see the children at regular intervals all winter long. The mother would bring the three or four children from time to time and I would go over each one of them, but I never saw that there was too much there.

Q. If you had suggested to Mr. Humphries that a warmer, drier climate might be more conducive to the little girl's health, is it possible that you could have suggested that?

A. I don't think that I would say that, because people in the so-called warmer, drier climates suffer from tonsillitis and colds. Alaska is no more unhealthy than Chicago.

Q. What is the general condition of her lungs at that time following her tonsillectomy?

A. I think the child's condition improved some-

(Testimony of James E. O'Malley.)

what, at least she had no further tonsillitis because her tonsils were out.

Q. Do you recall making any further examination of her lungs?

A. Not as such, all I can remember about the case is that the children were just like any other children and they got colds and upper respiratory infections all winter long for one reason or another, but not they were so seriously ill or anything like that.

Q. Did you make an examination of her lung condition following her tonsillectomy? [586]

A. I imagine I did, after all, I saw the children—that was in '47, and I continued to see the children at intervals until they left Anchorage around the 22nd of May, 1948.

Q. You stated that you “imagine you did,” Doctor, do you recall——

A. I believe that I did, let's say.

Q. You believe you did?

A. A choice of words there.

Q. Could it have been possible that you suggested that a change to a warmer, drier, climate might be more conducive to her state of health?

A. No, I don't think so. I will tell you why——

Q. Could it have been possible?

A. Anything could have been possible, but I remember distinctly that these people were leaving the City not from anything I did or said or recommended but it was in the course—usual course of

(Testimony of James E. O'Malley.)

events. They were leaving town, and I had nothing to do with it, to the best of my knowledge. I certainly wasn't the instigator of their leaving town.

Q. You misunderstand me, if they were leaving town as you recall, could it have been possible that you suggested that it was a good idea inasmuch as it might have been more conducive to the little girl's state of health—the new home where they——

A. They had no exact idea where they were going at the time. They had no idea of whether they were going to Minneapolis, [587] Texas, California. I had no reason to know where they were going, so I couldn't say that their health would be improved.

Q. You definitely remember that you did not make such a statement?

A. Because they didn't know where they were going, because they had several choices of places where they were going. They were going either to Minnesota, Kansas or California.

Q. Had you ever received any correspondence from Mr. Humphries since he has gone to the States?

A. My wife has received letters from Mrs. Humphries but not I.

Q. With reference to the little girl?

A. I don't know, they are my wife's letters. I don't examine my wife's correspondence.

Q. Your wife is a physician and surgeon?

A. My wife is a physician and surgeon?

Q. Did she treat the little girl?

(Testimony of James E. O'Malley.)

A. She did, yes, in the very beginning but she confines her practice to another specialty and gave the children to me.

Q. Do you know how many communications she received from the Humphries?

A. I have not the slightest idea.

Mr. McCutcheon: No further questions.

Mr. Cottis: Just one thing, Doctor.

Redirect Examination

By Mr. Cottis:

Q. Does Humphries owe you any money?

Mr. McCutcheon: Objected to as immaterial, incompetent and irrelevant.

Mr. Cottis: Mr. Humphries' credit is at issue here.

The Court: What is that?

Mr. Cottis: One of the issues in this case is Mr. Humphries' credit. It is set out in the complaint that his credit rating has been impaired.

Mr. McCutcheon: Renew the objection.

The Court: Objection is sustained.

Mr. Cottis: Thank you, Doctor.

The Court: Jury have any questions?

(No response.)

The Court: That is all. Another witness may be called.

Mr. Cottis: Call Frank Doyle.

FRANK DOYLE

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mr. Doyle?

A. Frank Doyle.

Q. D-o-y-l-e? A. D-o-y-l-e. [589]

Q. And what is your occupation?

A. I am with Kinkaid & King and at present I am on jury call.

Q. Mr. Doyle, did you know Kenneth Havins who was at one time associated with Vern Humphries in the restaurant business? A. I did.

Q. How long had you known Mr. Havins?

A. I have known Mr. Havins about two years, a little over two years.

Q. That is two years from now?

A. Yes, longer than that, about two years and one-half.

Q. Since the middle of '46?

A. 1947, yes, about the middle of '46 I knew Kennie.

Q. Where did you first know him?

A. He was with the railroad—the Alaska Railroad first and then he came with the Police Department.

Q. And were you on the Police Department at the same time?

A. I was on at the same time.

Q. Did you know him very well?

(Testimony of Frank Doyle.)

A. Yes, very well.

Q. Where is Mr. Havins now?

A. In California.

Q. When Mr. Havins and Mr. Humphries associated together to operate the restaurant at the Panhandle did you go into the Panhandle very frequently?

A. Well, I was there at the time they were remodeling it. [590] Kennie was going to go in business with Vern, but I believe he sold his interest to Hilton.

Q. Was there any dispute between Havins and Blackard? A. Not to my knowledge.

Q. Would you have known about it if there had been? A. I am sure I would.

Q. Was there any friction at all between them?

A. Not to my knowledge.

Q. And would you have known about it if there had been?

A. Yes, I believe Kennie would have said something about it.

Q. Mr. Doyle, have you been in the Panhandle fairly frequently or were you during March or April or May of 1948?

A. I was in there in—well, from time to time—from the time they were remodeling it and after they opened. I used to go in with Kennie and we would have coffee and I would stop and talk a little football with Joe Blackard.

Q. How long have you known Joe Blackard?

(Testimony of Frank Doyle.)

A. I have known Joe two years.

Q. When did you first meet?

A. Well, Joe had this Auto Service Center or was working there and I went down on an investigation. They had run away with Joe's Chevrolet.

Q. And that was two years or so ago?

A. It was in the summer of 1947 and I got to know Joe through that investigation of that safe.

Q. And that was before he had acquired any interest in the Panhandle?

A. Oh, yes, long before.

Q. When you were in the Panhandle, Mr. Doyle, did you ever see any card games being played?

A. No. No, the only time I was in there was during the day and I didn't see any card games during that time.

Q. Were there any card tables?

A. I believe there was a card table there but I don't know whether that was left from Tibbitt or Hardy but there was a table.

Mr. Cottis: No further questions.

Cross-Examination

By Mr. McCutcheon:

Q. You made a trip to Fairbanks, did you not, Mr. Doyle, in 1948? A. Yes, I did.

Q. Do you recall the date?

A. I believe it was in May—April or May.

Q. Could it have been in March?

A. No. No, I am sure it wasn't.

(Testimony of Frank Doyle.)

Q. Did you remain in Fairbanks?

A. Yes, all summer.

Q. What part of May did you go to Fairbanks?

A. I believe it was around the 15th of that—I am not sure. [592]

Q. How long after the restaurant was open did you go to Fairbanks?

A. Well, it seemed that the restaurant was opened a few months to my knowledge.

Q. Now, how often were you in the Panhandle premises in the months that you were here?

A. I think I was in the Panhandle about four or five times altogether.

Q. Altogether? A. Yes, sir.

Q. In the day time?

A. In the day time.

Q. And do you remember what months your visits were?

A. It was shortly after the Panhandle opened. I know I used to go in with Havins and we would have some coffee.

Q. A matter of days after the Panhandle opened, is that correct? A. Probably, yes.

Mr. McCutcheon: No further questions.

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Doyle, you may be excused.

Mr. Cottis: Call Earl Ray.

EARL RAY

called as a witness on behalf of the defendants, having been [593] duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mr. Ray?

A. Earl Ray, R-a-y.

Q. A year ago last spring were you one of the owners of the Sunshine Market in Anchorage?

A. I was.

Q. Do you recall a refrigerator that was delivered there by Blackard or Phillips or anybody else at that time? A. I do.

Q. Who delivered it?

A. I took it down myself.

Q. Where did you get the refrigerator?

A. I got it from the Panhandle.

Q. And have you seen it recently?

A. Yes, I went down and saw it the other day.

Q. Where was it?

A. It was in Mr. Blackard's home, I believe, or Mr. Phillips' home, I am not sure which.

Q. And what kind of refrigerator is it?

A. It was a Frigidaire.

Q. And you are sure it was the same refrigerator? A. I am sure.

Q. Have you ever had any other refrigerator from the Panhandle [594] that you know of?

A. No, I haven't.

Mr. Cottis: Your witness.

(Testimony of Earl Ray.)

Mr. McCutcheon: No cross-examination.

The Court: That is all, unless, of course, one of the jurors has a question.

Mr. Cottis: Excuse me, could I ask you one more question, Mr. Ray?

Q. When you picked up that refrigerator at the Panhandle whom did you get it from?

A. I don't understand the question.

Q. Well, who did you ask about the refrigerator when you got it at the Panhandle?

A. I didn't ask anyone, just went down and got it. Preparations were made before I went down there.

Q. With whom had you made the preparations?

A. I hadn't made the preparations, my partner had.

Q. And do you know with whom he had made them?

Mr. McCutcheon: Objected to.

The Court: He can tell whether he knows or not. Overruled.

Mr. McCutcheon: Withdraw the objection.

The Witness: The question, please?

Q. (By Mr. Cottis): Do you know with whom your partner had made preparations [595] to get the refrigerator?

A. I understood that he had made preparations, but I was never very certain who he made the preparations with.

Mr. Cottis: No further questions.

(Testimony of Earl Ray.)

Cross-Examination

By Mr. McCutcheon:

Q. Had you been in the Panhandle frequently?

A. At that time?

Q. Yes. A. Yes, I had been in there.

Q. Were you in there during the months of March, April and May, 1948?

A. I was in there in February and March.

Q. Were you in there in April?

A. I really couldn't say, I don't remember.

Q. Did you deliver meat and groceries to the Panhandle Restaurant? A. Yes.

Q. And do you recall the months?

A. I don't know, it was probably April was in there, too.

Q. Do you recall seeing any card games there?

A. Yes, they did have a card game at the time.

Mr. McCutcheon: Your witness.

Mr. Cottis: No further questions.

The Court: Do the jurors have any questions?

(No response.)

The Court: That is all, Mr. Ray.

Mr. Cottis: Mrs. Frank Jones.

MRS. FRANK JONES

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mrs. Jones?

A. Mrs. Frank Jones.

Q. And what is your given name?

A. Frankie.

Q. You are the wife of Frank Jones who owns Hy's cab? A. Yes.

Q. Were you subpoenaed to be a witness in this case and by whom? A. By the Marshal.

Q. On behalf of whom?

A. Vernon Humphries.

Q. And have you been here every day waiting to be called?

A. Yes, I have except this morning.

Q. And you have never been excused by Mr. Humphries or his attorney? A. No.

Q. Mrs. Jones, at our request did you examine the accounts [597] of Hy's Cab to determine whether there was any indebtedness of Joe Blackard to Hy's Cab?

A. I did, and I couldn't find a thing on it.

Q. There was no evidence of any indebtedness?

A. There wasn't anything with his name mentioned on it.

Q. What about Glen Phillips?

A. Nothing with his name in it either.

(Testimony of Mrs. Frank Jones.)

Q. How about Larry Starns?

A. Nothing.

Q. If Joe Blackard owed Hy's Cab at any time the sum of \$145 would you have discovered it on your examination of the books?

A. It should have been in the books, yes.

Q. Did you happen to know whether there had ever been any account owed by Vern Humphries?

A. There had been.

Q. Do you recall how big the accounts had ever been?

A. No, not exactly.

Mr. Cottis: No further questions.

The Court: Counsel for plaintiff may examine.

Mr. McCutcheon: No cross-examination.

The Court: Have the jurors any question?

Mr. Cottis: May I have the Court's indulgence to ask Mrs. Jones a further question?

The Court: Yes.

Q. (By Mr. Cottis): Mrs. Jones, for some time you and your husband resided at Humphries' house?

A. I did, sir, and then he did later on.

Q. Were you yourself living there at the time that a fire occurred last October?

A. I was not; I was in the States.

Mr. Cottis: No further questions.

Mr. McCutcheon: No further questions.

A Juror: When a charge account is closed out, what happens to the records?

The Witness: We gave them to Mr. Humphries.

A Juror: I said, when a charge account is closed out, what happens to the records?

(Testimony of Mrs. Frank Jones.)

The Witness: We didn't have any records, sir, on it after we gave a card.

A Juror: I didn't ask you that.

The Court: He is not asking you about Mr. Humphries' account but about any account when any card account is closed out, then what happens to the record?

The Witness: The only record we have, sir, is some slips we put in a box, a card we keep and when that bill is paid up, the customer can have that if he wants it. It isn't kept in a large ledger in a cab stand like it might be in an office, is that what you mean?

The Court: Even if a charge account was had and was paid [599] do you have some record that there was an account?

The Witness: The customer would have a slip on it.

The Court: I mean you, would you have a record even if an account was entirely paid and closed out?

The Witness: They may have; I am not sure.

Mr. Cottis: May I inquire further, Your Honor?

Q. I believe what the juror is interested in is this, Mrs. Jones, how can you be sure that Blackard and Phillips and Starns never owed anything to Hy's Cabs on the book?

A. I can't be, sir.

Q. In other words, if they had owed something and had demanded——

(Testimony of Mrs. Frank Jones.)

A. If they hadn't paid it it would be there but if they had paid we possibly wouldn't have any record.

Q. And the case you wouldn't have any record was where they had asked for the slips at the time they paid up? A. Yes.

The Court: Do you wish this witness to remain here?—

Mr. McCutcheon: I don't believe so, not now.

The Court: —for possible rebuttal?

Mr. McCutcheon: For rebuttal, yes, we might need her.

The Court: Is there any chance of closing the defendant's case this afternoon?

Mr. Cottis: No, Your Honor, none. I would like to point out to the Court that Mrs. Jones has been here for a full week at least now. [600]

The Witness: I have been here every day, yes.

The Court: I am wondering if she couldn't be excused for this afternoon, anyhow?

Mr. McCutcheon: Yes, as far as we are concerned.

The Court: And do you wish her to report at ten tomorrow as your witness?

Mr. McCutcheon: Yes, we do. We don't know whether or not we will use her, it depends on what develops in defendant's case.

The Court: You are excused to report again at ten o'clock tomorrow morning.

Mr. Cottis: Your Honor, may I have about a

(Testimony of Mrs. Frank Jones.)

twelve-minute recess. I didn't realize that the plaintiff was going to rest so soon because he had witnesses there and I want to see what witnesses I have available on such short notice.

The Court: Very well, we will stand in recess until 3:45.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Cottis: Call Mr. Schroeder.

ERNEST SCHROEDER

called as a witness on behalf of defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. Ernest Schroeder.

Q. Mr. Schroeder, what do you do for a living?

A. Foreman for the Bliss Construction.

Q. And where have you been today?

A. Down on the Montford residence, 2nd and Christianson Way.

Q. Were you a foreman for Bliss Construction in January and February of 1948? A. I was.

Q. Have I ever discussed this case with you until just now? A. No.

Q. Now, do you know the plaintiff Vern Humphries? A. I do.

(Testimony of Ernest Schroeder.)

Q. Did you have occasion to do some work for Mr. Humphries in the Panhandle premises during January and February of 1948? A. I did.

Q. Did Mr. Humphries request Bliss Construction Company to do that work? A. Yes.

Q. Will you tell the Court as nearly as you can remember what work was done for Mr. Humphries?

A. We remodeled a counter for his restaurant.

Q. Now, was any bill ever given to Mr. Humphries for that work? A. Yes. [602]

Q. Now, Mr. Schroeder, I want you to be very careful about your testimony. Assuming, for example, that it has been denied here under oath that any bill was ever submitted to Humphries for that construction work, would your answer still be the same? A. Yes.

Q. You are sure that a bill was given to him?

A. Yes.

Q. How do you know?

A. I had to go down with Mr. Bliss to see Mr. Humphries two or three days, something like that, after he had opened his restaurant and go through the bill with him. There was some materials in there he didn't know just exactly where they were and how much there was and I pointed out on the counter where they were and how much was there and how much credit he had of the amount that I had purchased for it, it being black formica.

Q. That is a type of material, is it?

A. It is a type of material around the bottom

(Testimony of Ernest Schroeder.)

of the counter for a toeboard and also for a ledge where the chairs sat on as a binder.

Q. Did you have a conversation at a card table in the Panhandle? A. I did.

Q. And who was present?

A. Mr. Bliss and Mr. Vern Humphries and myself.

Q. How long did the discussion go on as nearly as you can [603] remember?

A. I think it was something about half hour.

Q. There is no doubt at all in your mind that Mr. Humphries was there?

A. He was there; he sat right at the table with us.

Q. Had a bill been submitted to him in writing at that time?

A. He had a complete set of bills for the entire job.

Q. And is that what he was criticizing?

A. That was what he was criticizing.

Q. In other words, he was questioning various detailed items on those bills?

A. That is right.

Mr. McCutcheon: Just a moment, now counsel repeatedly admonished me not to ask leading questions.

The Court: I have not found a lawyer to fail to ask all the leading questions he can.

Mr. McCutcheon: I wish Mr. Cottis would return the favor by attempting to refrain.

(Testimony of Ernest Schroeder.)

The Court: Objection is sustained and Mr. Cottis will refrain from asking leading questions. This is not a hostile witness as far as I can discern.

Q. (By Mr. Cottis): Will you relate as much of the conversation that took place three or four days after the opening of the Panhandle Restaurant in March, 1948, between you, Humphries and Mr. Bliss, as [604] you can recall?

A. Mr. Humphries promised us at the table that he had the money to pay for the counter.

Q. I am sorry, I didn't catch that?

A. Mr. Humphries assured me that he had the money to pay for the counter.

Q. At that time did he so assure you?

A. Said "Yes" Mr. Bliss and myself.

Q. What was the total amount of the charges due you at that time?

A. I don't remember exactly, it was about \$3,000.

Q. Now, relate anything else that you can remember of that conversation?

A. That was all.

Q. Well, didn't you testify that items had been questioned on the bill? A. Yes.

Q. Can you recall any other items that were questioned? A. No.

Q. Who had engaged you originally to do that work? A. Vern Humphries.

Q. Had there been any discussion at that time with respect to payment to Bliss Construction Company for the work? A. Yes.

(Testimony of Ernest Schroeder.)

Q. What was that discussion as nearly as you can remember? [605]

A. Before I started the counter he told me that Mr.—I forget his name—at The First National Bank—what is the cashier over at The First National Bank?

Q. Baker?

A. That Mr. Baker had the money.

Q. Had the money to pay Bliss Construction?

A. To pay Bliss Construction.

Q. And can you place about when that conversation took place?

A. It was some time in the last part of March, I believe, they had just opened their restaurant a few days.

Q. Well, you stated—did you just state that there was a conversation about Mr. Baker before you began work?

A. Yes, he told me that Mr. Baker would have the money, that he had to borrow it from Mr. Baker in the bank.

Q. Was that before the restaurant had opened?

A. That was before we started the work and he also repeated it the day we corrected the bill.

Q. On that day there was a further conversation about Mr. Baker, is that right?

A. Yes, he said—

Q. Did you have any conversations with Mr. Humphries while the work was in progress?

A. Yes, I gave him a carpenter, Miles Prince, to do the work and Mr. Humphries supervised him

(Testimony of Ernest Schroeder.)

nearly all the way through. I was in charge of getting the material and supervision that went [606] with it.

Q. Can you make any estimate of how many conversations you had with Mr. Humphries while the work was being done?

A. No, I couldn't exactly state that.

Q. Did you see him once a day or once a week?

A. Yes, an average of once a day.

Q. Were you on the premises quite frequently or not very much?

A. I was there quite steady on that job.

Q. How steady, do you think?

A. I would average at least 7 hours a day there.

Q. Of being on the Panhandle premises?

A. Yes.

Q. Was your company doing any other work on those premises?

A. Yes, they done work for Mr. Campbell and they done work for Mr. Blackard.

Q. Then there were three different contracts going on? A. That is right.

Q. Now, do you know what the work was that was being done for Mr. Blackard?

A. We built a bar for him—back bar and remodeled the Ladies' and Gents' washroom.

Q. Were you in charge of all three jobs?

A. I was.

Q. Can you tell us what work was going on for Mr. Campbell? [607]

A. Putting in a new floor, done under-painting

(Testimony of Ernest Schroeder.)

underneath a——

Q. Mr. Schroeder, are you familiar with the handwriting of Harold Bliss? A. I am.

Q. Would you recognize his signature if you saw it? A. Yes.

Q. Mr. Schroeder, do you recall anything about the mirrors that were put into the rest rooms at the Panhandle?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled, you may answer.

The Witness: There were two mirrors on the old bar and they were removed and one was placed in the Ladies' restroom and one in the Gents' restroom.

Q. (By Mr. Cottis): Will you tell me again what you recall about the mirrors?

A. There were two mirrors on the old back bar that were removed and they were placed one in the Ladies' restroom and one in the Mens' restroom.

Q. Were the mirrors in good condition?

A. They were.

Q. Were there any other mirrors in the Mens' or Ladies' restrooms? A. No.

Q. How do you know that the mirrors that were put in the Ladies' and Mens' restrooms came from the old bar?

A. We removed them from the old bar. [608]

Q. That is, your company did, is that what you mean?

A. No, Mr. Blackard had a party there of his own that removed them and we took them and put them in each toilet.

(Testimony of Ernest Schroeder.)

Q. You installed them in the toilets?

A. Yes, they came off the old back bar.

Q. You are sure of that? A. Yes.

Q. Now, were there any mirrors for the new bar that you installed?

A. Yes, we furnished—I think there were four mirrors—four mirrors on that back bar, 36 by 48.

Q. Each of them was 36 by 48?

A. That is right.

Q. Where were those acquired?

A. They were acquired from the Bliss Construction.

Q. Did you testify you were on the premises about 7 hours a day while this work was going on? A. Yes.

Q. Did you ever hear any conversation between Humphries and Blackard and Starns about the length of the restaurant counter? A. No.

Q. Did you ever hear any conversation about a bond that was referred to and some agreement among the parties? A. No.

Q. Did Humphries ever pay Bliss Construction Company its [609] bill?

A. I don't think so.

Mr. Cottis: Your Honor, I have only one further question and that is with respect to a signature I had and I am unable to locate the document right now and I have no objection to cross-examination now if I may have the privilege of asking the witness that one question when counsel for plaintiffs is through.

(Testimony of Ernest Schroeder.)

The Court: Very well, counsel for plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Where did you say the mirrors came from, Mr. Schroeder?

A. They came off the old back bar that was in there.

Q. Do you know whether or not Mr. Blackard bought them from Mr. Humphries?

A. No, I don't know who he bought them from.

Q. You say you didn't hear any reference to a bond?

A. No, I didn't.

Q. Well, could it have been possible that the conversation with reference to a bond had taken place while you were in the premises and you not heard it?

A. It is possible.

Q. Now, was work ever stopped at one time on the Panhandle premises because of a dispute between Mr. Humphries and Mr. Starns and Mr. Blackard, do you recall that?

A. No, I—I stopped the work on the restaurant due to a [610] dispute between Mr. Humphries and myself.

Q. Do you remember work being stopped because of a dispute between Mr. Humphries, Mr. Blackard and Mr. Starns?

A. No.

Q. At no time?

A. At no time.

Q. Do you remember a coal chute in the premises?

(Testimony of Ernest Schroeder.)

A. Yes, there was a coal chute in the place.

Q. Wasn't that coal chute boarded up when you remodeled the place?

A. I think we made a grill out of there, two by four grill.

Q. Across the top of the face of the coal chute, did you not? A. Yes.

Q. Have you done any work for Mr. Starns since that time?

A. I have never done any work for Mr. Starns.

Q. Have you done any work for Mr. Blackard since that time? A. No.

Q. Are you friendly with Mr. Blackard at this time? A. Yes.

Q. Are you friendly with Mr. Humphries?

A. Yes.

Q. Good friends, are you, you and Mr. Humphries?

A. As far as I am concerned we are.

Q. Did you ever have an argument—are you friends with [611] Mr. Campbell?

A. Yes.

Q. Do you remember an argument between Mr. Campbell, yourself and Mr. Bliss over the sum owed Mr. Bliss by Mr. Campbell? A. No.

Q. Do you remember making a bid on Mr. Humphries' home for the repair of damage caused by a fire? A. Yes.

Q. And do you remember a dispute you had with Mr. Humphries over that?

(Testimony of Ernest Schroeder.)

A. Didn't have no dispute there at all, Mr. Bliss is the contractor and does the bidding.

Q. Well, was there any dispute over that?

A. Pardon me?

Q. Was there any dispute between Mr. Bliss and Mr. Humphries over that bid?

A. I think there was, we didn't do the work anyway.

Q. Did you have any part in that argument?

A. No.

Q. Did you make the estimate for the bid?

A. No.

Q. Did you take a look at the premises?

A. I did.

Q. Well, did you have a contract with Mr. Humphries as to the remodeling of the counter? [612]

A. Just a verbal contract.

Q. What was the total obligation?

A. I beg your pardon?

Q. What was the total obligation at the completion?

A. I think about \$3,000, that included some plumbing and the total bill.

Q. Do you remember a dispute as to who owed the bills—Mr. Blackard or Mr. Humphries?

A. Mr. Humphries acknowledged the bill.

Q. Was the contract in writing?

A. No.

Q. Do you have any evidence that he acknowledged the bill?

(Testimony of Ernest Schroeder.)

A. Yes, I could—I could get testimony, I believe.

Q. You could what?

A. I can bring testimony, I believe, but it is out of town, though.

Q. Were you ever in the Panhandle premises after it opened? A. Yes.

Q. More than once?

A. Quite a number of times.

Q. In the month of April? A. Yes.

Q. Did you eat at the restaurant?

A. I did.

Q. Did you see the card games in operation there? [613] A. No.

Q. You didn't see any card games at any time?

A. No.

Q. Did you see any card tables there?

A. I seen card tables.

Q. Did you ever see a card table in operation?

A. No.

Q. Did you discuss this case with anybody prior to coming here? A. No.

Q. Ever? A. Never.

Q. How many card tables were there?

A. There were two on the premises all the while we were working there.

Q. You never saw a card game in operation after the premises opened? A. No.

Q. How often were you in there?

A. Oh, maybe a dozen times.

(Testimony of Ernest Schroeder.)

Q. Is it possible that a card game could be conducted there and you not see it? A. Yes.

Q. Were you there in the evenings?

A. No.

Q. Always in the day time? [614]

A. Day time.

Mr. McCutcheon: No further questions.

The Court: Is Mr. Bliss in the City?

The Witness: Yes.

Mr. Cottis: I am afraid I can't produce the document I was looking for, Mr. Schroeder, so I don't have any further questions.

Juror: In addition to the counter, the floor and the bar, did your company put a liquor store in the Panhandle?

The Witness: No.

Juror: How did you know it was Mr. Humphries that originally engaged you? Did he come to the shop or did he 'phone?

The Witness: No, he hired me right on the job while we were working for Mr. Blackard and Mr. Campbell.

Juror: In other words Mr. Blackard hired you first and while you were in the Panhandle Mr. Humphries engaged you?

The Witness: Yes, he had the restaurant concession there. He engaged us to remodel the counter.

Juror: He didn't visit the work shop or 'phone the offices?

(Testimony of Ernest Schroeder.)

The Witness: Pardon me, I don't understand?

Juror: Mr. Humphries didn't originally come to the work shop to engage the Bliss Construction Company?

The Witness: No, he hired Bliss Construction through me right there in the building.

Juror: Then the bill that was originally presented to [615] him—the first one—was it for old work on the restaurant?

The Witness: No, the bills were divided. We had three jobs there—one for remodeling the counter for Mr. Humphries, one for remodeling work for Mr. Campbell, and then Mr. Blackard had a bar bill.

Juror: But the one that was presented to Mr. Humphries was for work only on the restaurant?

The Witness: Only his work, yes.

Juror: When was the first bill presented?

The Witness: That I couldn't say.

Juror: Isn't it the general procedure to go through the office and then they mail them out?

The Witness: Yes. I have nothing to do with that end, I just supervise the building and the bills when they are totaled up and ready we send it out of the office.

Juror: Then the bill you discussed with him with Mr. Bliss was after payment was refused on the first bill?

The Witness: No, he didn't refuse to pay the bill.

(Testimony of Ernest Schroeder.)

Juror: But it was a number of days later?

The Witness: Yes.

Mr. Cottis: May I inquire, Your Honor? I think there might be some confusion if I don't.

The Court: Go ahead.

Redirect Examination

By Mr. Cottis:

Q. You testified, didn't you, that it was not paid later by Mr. Humphries, isn't that correct?

A. He promised to pay the bill the day we were there after we adjusted—showed him where the material was in that counter—the formica and chrome fittings.

Q. Your testimony was, so far as you know Humphries never paid the bill?

A. That is right.

Q. But he did acknowledge his indebtedness?

A. He did.

Q. In other words, if the bill has been paid somebody other than Humphries has paid it?

A. Yes, so far as I know.

Q. Was there ever any confusion among these three jobs; was there ever any doubt expressed by anybody as to whose responsibility this work was or that work was or this work was? A. No.

Q. It was all perfectly clear among you at all times? A. At all times, yes.

Juror: Have all three of those bills been paid now?

(Testimony of Ernest Schroeder.)

The Witness: I don't know, I have no access to Mr. Bliss' accounts. He handles that himself except in this one case here where there was a question there in regards to this material and he asked me if I would go down with him and point out to Mr. Humphries where it was and how much was there, which I did. [617]

Juror: Did the Bliss Construction Company build the liquor store?

The Witness: No.

Q. (By Mr. Cottis): Who did?

A. Daniel Wood.

Q. Is there any connection between him and your company? A. No.

Q. When Mr. Blackard engaged your company to do work on the bar was Mr. Starns also in consultation with you? A. No, not with me.

Q. Your only agreement was with Blackard, then? A. Blackard, yes.

Q. Did you have a written agreement with him?

A. I don't know about that, they gave him a quotation on that bar. I think there was a flat price on that.

Q. During the course of construction did Blackard for his work, Campbell for his work, Humphries for his work, confer with you from time to time with respect to details of the construction?

A. They did.

(Testimony of Ernest Schroeder.)

Q. Did Starns ever confer with you with respect to any of those details? A. No.

Mr. Cottis: That is all. [618]

Juror: Are you going to call Mr. Bliss?

Mr. Cottis: Yes, we will have Mr. Bliss here tomorrow, I hope.

Mr. McCutcheon: I would like to ask a further question.

Recross-Examination

By Mr. McCutcheon:

Q. You say you did nothing for Mr. Starns?

A. That is right.

Q. You remodeled the front of the building, did you not? A. For Mr. Blackard?

Q. Did you remodel the liquor store side, too?

A. Yes, for Mr. Blackard.

Q. Who paid you?

A. I don't know who paid the bill.

Mr. McCutcheon: No further questions.

The Court: That is all, Mr. Schroeder. You may be excused. Another witness may be called.

Mr. Cottis: Would you call Mr. Swackhamer, please?

DONALD F. SWACKHAMER

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your full name?

A. Donald F. Swackhamer. [619]

Q. Are you the same one who is the shortstop on the Anchorage Ball Team? A. Yes.

Mr. McCutcheon: I would like to ask the witness if he wasn't present in Court while Mr. Humphries was testifying?

The Witness: I was not.

Mr. McCutcheon: You haven't been present in Court at any time during any of the proceedings of this trial, have you?

The Witness: Thursday of last week I was here for approximately five minutes until the Judge asked me to leave.

Mr. McCutcheon: No objection.

Mr. Cottis: Was there objection?

The Court: No, counsel said "No objection."

Q. (By Mr. Cottis): Mr. Swackhamer, what do you do for a living now?

A. I am a grocery clerk at the Food Center.

Q. Did you ever work for Humphries?

A. Yes, I did.

Q. When?

A. Two weeks previous to the day of closing his restaurant, approximately 14 days.

(Testimony of Donald F. Swackhamer.)

Q. Can you remember about what month that would have been?

A. Last May—a year ago May, excuse me, May of 1948.

Q. Now, Mr. Swackhamer, what was your job with Humphries? A. I was a cook. [620]

Q. And what wages were you supposed to be paid?

A. \$16—two—two-dollars per hour.

Q. Have you ever been paid?

A. No, sir, I was allowed to draw \$40 of my wages by permission of Mr. Campbell and I had approximately \$250 coming and I only collected \$40 of which I was allowed to draw my wages.

Q. Had you worked anywhere before then?

A. Here in Anchorage?

Q. In Anchorage? A. No, sir.

Q. That was the first job you had had in Anchorage, then? A. Yes, sir.

Q. And how much were you paid for your two weeks' work? A. \$40.

Q. And how much should you have been paid?

A. Approximately \$250. I worked 14 straight days and two days of overtime pay plus twelve days straight pay.

Q. Have you been paid the balance yet?

A. No, sir.

Q. Did you have any private finances of your own at that time? A. No, I did not.

Q. Were any promises made to you with respect to payments?

(Testimony of Donald F. Swackhamer.)

Mr. McCutcheon: Objected to as leading?

The Court: Overruled. [621]

Q. (By Mr. Cottis): Did anybody promise to pay you your wages?

A. Yes, I was promised to get my checks.

Q. Who promised you that?

A. Mr. Campbell and Mr. Humphries both.

Q. Where were you to get your checks?

A. At the Panhandle Cafe.

Q. Mr. Swackhamer, where do you work now?

A. Food Center.

Q. And how long have you been working there?

A. Since last August.

Q. While you were working at the restaurant at the Panhandle for Humphries and Campbell did you have occasion to notice the amount of inventory of consumable supplies that were carried there?

A. Yes, I had access to them.

Q. What is your estimate of the average daily running inventory in dollars?

A. Oh, four to five-hundred dollars.

Q. Four to five-hundred dollars? A. Yes.

Q. At any time while you were there did the inventory get into the neighborhood of \$4,000?

A. No.

Q. Was there a coal chute on the premises somewhere? [622]

A. I believe there was, yes.

Q. Now, you testified that you worked there during the last two weeks before the place was closed, is that right?

A. Yes.

(Testimony of Donald F. Swackhamer.)

Q. Did you ever have occasion to go into the store room in the basement? A. Yes, I did.

Q. How did you go there?

A. I got the keys from Mr. Phillips and asked his permission if I could go into the cellar and obtain potatoes that were stored there.

Q. Did he give you the keys?

A. Yes, he did—no, he didn't give me the keys, he opened the door himself and let me in.

Q. Did you ever ask permission to go down there and be refused? A. No.

Q. Did you ever go down to the storeroom by any other means than the door? A. No, sir.

Q. Was there any merchandise other than Mr. Humphries' stored down there in that storeroom?

A. Not that I know of, no.

Q. Was there any merchandise other than Humphries' stored in the entrance to the storeroom?

A. I don't believe so, no.

Q. Now, when you talk of a \$400 inventory do you include all the storage places that Humphries had food stored?

A. Yes, I included meat supply, perishable and such stock as that at the time.

Q. No matter where it was stored on the premises, is that correct? A. Correct.

Q. Can you estimate for us what the daily running amount of perishables was in dollars?

A. Oh, I would say from \$75 to a hundred dollars.

(Testimony of Donald F. Swackhamer.)

Q. What type of things were in the basement storeroom when you were down there?

A. Potatoes only that I know of.

Q. And about how much potatoes?

A. Approximately four sacks—four or five sacks.

Q. How big were the sacks?

A. Hundred pounds.

Q. Were there any card tables in the premises while you were working there? A. Pardon?

Q. Were there any card tables near the restaurant counter when you were working there?

A. Yes, there were two that were unoccupied and turned up on end, stools were placed on them—rather, they were upside [624] down and were not in use. They were next to the back door.

Q. You never saw them in use?

A. Never saw them in use, no, sir.

Q. What shift did you work?

A. From ten to six, graveyard shift, ten in the evening until six in the morning.

Q. From ten in the evening until six in the morning? A. Yes, sir.

Q. During the two weeks that you were employed there was the restaurant open from those hours—from ten in the evening until six in the morning? A. Yes, sir.

Q. Every night so far as you know?

A. Every night.

Mr. Cottis: Your witness.

(Testimony of Donald F. Swackhamer.)

Cross-Examination

By Mr. McCutcheon:

Q. When did you work there, Mr. Swackhamer?

A. Two weeks previous to the day of closing.

Q. How old are you? A. 28.

Q. And you are a cook, are you?

A. I am.

Q. You are now employed as a grocery clerk?

A. I am. [625]

Q. How much experience have you had cooking?

A. I have had two years' experience. I owned two restaurants of my own in the State of Washington.

Q. And you say that the inventory was about \$400—four and five-hundred dollars?

A. Between four and five-hundred dollars.

Q. How much meat was carried?

A. Oh, I would say approximately \$300 to \$400.

Q. Well, then, your estimate of the inventory didn't include meat, is that correct?

A. It included meat and perishables—potatoes and such as that, yes, sir.

Q. Perhaps I misunderstood you, how much was the total inventory?

A. From four to five-hundred dollars.

Q. Now, again, how much did he carry in meat?

A. From three to four hundred dollars.

Q. Well, did he carry any flour?

A. What was in the bin.

Q. Well, how much was in the bin?

A. Approximately 40 pounds—30 or 40 pounds.

(Testimony of Donald F. Swackhamer.)

Q. How much is that worth?

A. I don't know wholesale, retail at 35-cents a pound,—no, I beg your pardon.

Q. How much a pound did you say? [626]

A. 35-cents for five pounds. I have forgotten all my prices.

Q. Well, approximately what would 40 pounds of flour be worth, Mr. Swackhamer?

(No response.)

Q. Can you approximate it?

A. No, I can't.

Q. How did you arrive at your estimate of the total inventory, you approximated that, didn't you?

A. 50 pounds of flour is \$2.85 for 50 pounds.

Q. \$2.85? How much potatoes did he carry?

A. I believe there was four or five sacks in the basements.

Q. How much a sack are potatoes?

A. Potatoes are \$7.75 per sack per hundred pounds.

Q. And how much meat did you say he carried?

A. From three to four hundred dollars' worth.

Q. And what kind of meat did he carry? Did he carry T-bone steaks or did he have a whole side of beef or what?

A. He carried several loins of pork—I would say two or three loins of pork.

Q. And what else?

A. Several cut steaks such as T-bones, ribs, porterhouse, chicken-fries.

(Testimony of Donald F. Swackhamer.)

Q. How many chickens did he have?

A. Chickens? I don't know.

Q. Do you have any idea? [627]

(No response.)

Q. Did you see some chickens there?

A. No, I don't believe there were any chickens there at the time.

Q. None at all? A. No, sir.

Q. Would you remember them if you had seen them? A. I imagine I would, yes, sir.

Q. And do you remember that there weren't any chickens there, is that correct? A. Yes, sir.

Q. What else did he carry in the line of meats and fowl?

A. The pork and the beef were about all that were there at the time.

Q. Did he have any hamburger?

A. Yes, ground beef.

Q. And how much of that did he have?

A. Approximately fifty pounds.

Q. And how much is that worth?

A. I don't know the price of hamburger.

Q. How did you approximate the total inventory if you didn't know the price of hamburger, Mr. Swackhamer?

A. It is an approximate estimate.

Q. Then what do you approximate the hamburger's worth to be?

A. Hamburger retails at approximately 75 to 80-cents per [628] pound.

(Testimony of Donald F. Swackhamer.)

Q. How many pounds were there?

A. Approximately fifty.

Q. Did he have any onions? A. A few.

Q. How many? A. Two pounds.

Q. Where were they kept?

A. In a cold-storage box out front.

Q. How many pounds did you say?

A. Approximately two.

Q. And what were they worth?

A. 15-cents a pound.

Q. Do you remember that there were two pounds there, do you? A. Approximately.

Q. Now, how about bacon, did you serve bacon and eggs? A. Yes.

Q. How much bacon? A. One slab.

Q. Even? A. Yes, I believe it was.

Q. How much is that worth?

A. Bacon retails at \$1.15 per pound.

Mr. Cottis: Your Honor, I ask that counsel's question be clearer as to whether he is talking about the termination [629] of the restaurant operation or the average day to day run of the inventory here?

Q. (By Mr. McCutcheon): What are you testifying to, Mr. Swackhamer?

A. The inventory kept on hand.

The Court: Counsel may proceed.

Q. (By Mr. McCutcheon): Now, did he have any fruits—canned fruits? A. No.

Q. None whatsoever? A. None.

(Testimony of Donald F. Swackhamer.)

Q. No canned peaches? A. No, sir.

Q. No canned grapefruit? A. No, sir.

Q. No canned apricots? A. No, sir.

Q. Did you ever serve fruit in the restaurant at all? A. No, sir.

Q. How about canned peas, did he have any canned peas?

A. Yes, there was, I believe, several No. 10 tins in the back rooms of canned peas.

Q. Did you ever use peas? A. Yes, sir.

Q. How many tins did you say? [630]

A. Two or three.

Q. And what were they worth?

A. One-dollar—one-dollar twenty per can.

Q. Did he have any coffee? A. Yes, sir.

Q. How much coffee?

A. One 20-pound can.

Q. And what is that worth?

A. 65-cents per pound retail.

Q. Well, did you estimate the value of the coffee that remained? A. Yes, approximately \$10.

Q. Did he have any sugar?

A. About 20-pounds in the bin.

Q. And did he have any soap?

A. Some that he had made himself, yes.

Q. How much soap?

A. About five pounds.

Q. Well, did he have any string beans?

A. No.

Q. Did he have any sauerkraut? A. No.

Q. Have any pickles?

(Testimony of Donald F. Swackhamer.)

A. Yes, there was one gallon of sliced dills there to serve sandwiches. [631]

Q. Did he have any dried fruit?

A. No, sir.

Q. No dried fruit whatsoever? A. No, sir.

Q. None whatsoever?

(No response.)

Q. No dried prunes? A. No, sir.

Q. Are you sure?

A. I saw no dried prunes.

Q. Did he have any canned beets?

A. No, sir.

Q. Well, what did you sell in this restaurant besides meat?

A. The supply was depleted and we sold what was there and aside from the meat items there was very little.

Q. Well, under what circumstances did you leave your job, Mr. Swackhamer?

A. The place was closed and Mr. Humphries asked me to stay on and clean up and that would be our last day.

Q. And do you know why the place was closed?

A. No, I do not.

Q. Did you ever overhear any arguments between Mr. Blackard and Mr. Humphries and Mr. Campbell? A. No, I did not.

Q. When did you leave the job? [632]

A. Approximately eleven o'clock of the same day it was closed.

(Testimony of Donald F. Swackhamer.)

Q. What day was that?

A. The exact date I don't know.

Q. Well, did the restaurant operate at all after you left there? A. No, it did not.

Q. It was closed then from then on, was it?

A. Yes.

Q. You talked with Mr. Cottis about the case, of course, didn't you, before you came here to testify? A. No, sir.

Q. You have never talked to Mr. Cottis about this case?

A. And who is Mr. Cottis, please?

Q. The gentleman standing right there?

A. Yes, I spoke with him.

Q. Didn't you know who I referred to when I said "Mr. Cottis"?

A. He did not introduce himself, no.

Q. Did you talk to Mr. Blackard?

A. I did.

Q. Did you talk to Mr. Castlio?

A. I don't know Mr. Castlio.

Q. How many tins of peas were there?

A. Two or three.

Q. Was there any corned beef there?

A. No. [633]

Q. None whatsoever?

A. None whatsoever.

Q. Any cabbage? A. No, sir.

Q. Any fish?

A. Yes, there was several slices of halibut and several slices of salmon.

(Testimony of Donald F. Swackhamer.)

Q. Any carrots? A. No.

Q. When did you first have occasion to remember the value of the inventory, Mr. Swackhamer?

A. From day to day I have been in direct contact with the inventory.

The Court: I think we shall have to suspend. Ladies and Gentlemen of the Jury, we will suspend now until ten o'clock tomorrow. You will remember your obligation not to discuss the case among yourselves or with others and not to listen to any conversation about it and not to form or express an opinion until it is finally submitted to you. You may now retire and report again at 10 o'clock tomorrow morning.

You may step down, Mr. Swackhamer and report again at 10 o'clock tomorrow morning.

(Whereupon, at five o'clock p.m., Tuesday, June 28, 1949, the trial was recessed until 10:00 a.m. Wednesday, June 29, 1949.) [634]

Wednesday, June 29, 1949.

The Court: Clerk may call the roll of the jury.

(Juror's names were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Mr. Swackhamer may resume the witness stand. Counsel may proceed with the examination.

DONALD F. SWACKHAMER

called previously as a witness in behalf of the defendants, having previously been duly sworn, resumed the stand and testified as follows:

Mr. McCutcheon: No further cross-examination.

The Court: Any further direct examination.

Redirect Examination

By Mr. Cottis:

Q. Mr. Swackhamer, do you recall whether there was any other method of getting into the storeroom that was in the basement other than going through the little entry-room near the Men's and Ladies' rest room?

A. Yes, there was. There was a trap door in the cooler by which we could enter the basement.

Q. Did you ever enter the basement that way?

A. No, I did not.

Q. Did you ever see anybody enter the basement that way? A. No, I did not.

Q. Was there any sort of wooden grill work over the door? [637]

A. Yes, I believe there was several boards across the opening.

Q. Do you know whether they were removable or not? A. They were?

Q. Were they nailed to the flooring at all?

A. No, they were loose.

Mr. Cottis: No further questions.

The Court: Do the jurors have any questions?

(Testimony of Donald F. Swackhamer.)

Juror: Which is the cooler? Could he show us on the diagram which the cooler was?

The Court: Well, if the witness knows he may answer. You may bring the chart up.

Mr. Swackhamer, this purports to be a drawing of the premises. You can point out, if you know enough about it, to point out, where the cooler is. If you don't know enough about the drawing to do that just don't attempt it even. You may go down and look at it.

Q. (By Mr. Cottis): This is supposedly Fourth Avenue. This is supposed to be the bar.

A. This is the liquor store here and this is the restaurant here and in this cool room was directly behind it. The cool room was directly behind the restaurant and here is the entrance to the cool room and just inside this entrance to the cool room there was a trap door approximately here that opened into [638] a cellar or basement below the premises in which there were potatoes kept down there.

The Court: Does any other juror have a question?

(No response.)

The Court: That is all, Mr. Swackhamer. Another witness may be called.

Mr. Cottis: Mr. Herning.

G. S. HERNING

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. G. S. Herning.

Mr. McCutcheon: Before counsel proceeds, Mr. Herning, you were present in the court room during a good part of this trial were you not?

A. I was.

Mr. McCutcheon: I object to the testimony of the witness, Your Honor, on that ground.

The Court: Objection is sustained.

Q. (By Mr. Cottis): When were you present? Your Honor, may I inquire a little further?

The Court: Yes. [639]

Q. (By Mr. Cottis): When were you present in the Court room, please?

A. I was present last week during two or three days during the first part of the trial.

Q. For a substantial amount of time each day?

A. Well, I was here both in the morning and in the afternoons.

Mr. Cottis: Very well, I guess you may step down.

The Court: Another witness may be called.

Mr. Cottis: Call Mr. Guard.

JACK GUARD

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name?

A. Jack Guard.

Q. What do you do for a living, Mr. Guard?

A. Cook.

Q. Whereabouts?

A. Anchorage Railroad now.

Q. Do you know Vern Humphries and Marvin Campbell? A. Yes.

Q. Do you know Joe Blackard? A. Yes.

Q. How long have you known those various people?

A. Oh, I met Joe just before he bought in the Panhandle. I have seen Humphries as a cook around town before—when he first came to town, I guess.

Q. And what about Marvin Campbell?

A. Not until I seen him washing dishes in the Panhandle, first time I ever seen him.

Q. Did you work for Humphries at the Panhandle? A. About four or five days.

Q. And do you recall when that was?

A. Well, it was either last of April or the first of May, right in there.

Q. Of 1948?

(No response.)

(Testimony of Jack Guard.)

Q. Then did you handle the kitchen in the Panhandle after Humphries had closed the restaurant?

A. Yes.

Q. And what period of time would that have been?

A. First day of June until the second or third week in July.

Q. What happened in July?

A. Well, I seen he couldn't make it, seen I couldn't make no money. I left—closed up and left.

Q. When you were working for Humphries did you observe any card games on the premises?

A. None whatsoever. [641]

Q. Will you describe Humphries' operations for the four or five days that you worked there, how long he kept the restaurant open and what sort of service he gave?

A. Yes, I think I was working the evening shift, if I remember right, it could have been days—it would be the afternoon shift, I guess. I am not sure but I think they were open 24 hours there—three crews.

Q. How many people were employed?

A. Oh, they were. I would say, four cooks there a day, I know that.

The Court: I didn't understand.

The Witness: There was one cook on each shift and then sometimes there was two then during that summer or something and made—and at least one girl all the time. There was quite a payroll there,

(Testimony of Jack Guard.)

I know that. There was a lot more than I had. There was about 60 or 90-dollars a day payroll.

Q. (By Mr. Cottis): How did the size of the payroll compare with your payroll when you operated the restaurant? A. More than double.

Q. More than double the number of employees that you had? A. Oh, yes.

Q. What were the circumstances of your leaving Mr. Humphries' employ?

A. We had a few words and he was disagreeable with me and I [642] left. I didn't care to stay there any way.

Q. Had you been in restaurant work before you went to work for Mr. Humphries? A. Yes.

Q. Where was that?

A. I had worked in, oh, Totem Club and Thompson's, and worked in Anchorage a couple of years before that or three outside.

Q. Did you ever own your own restaurant anywhere?

A. A couple of little lunch counters in the States.

Q. Whereabouts in the States?

A. I ran one at Lone Pine, California, once and one in Inyokern.

Q. Mr. Guard, when you took over the restaurant, will you describe what condition it was in?

A. Well, it wasn't in any condition, as far as that goes, the doctor ordered that stuff taken out of those iceboxes and destroyed and got permission from Mayor Loussac to burn it that night at the

(Testimony of Jack Guard.)

garbage dump. It was after hours. And then we worked about a week or two there, somewheres around ten days or so, cleaning that place up enough. The doctors wouldn't let me open it.

Q. Would not let you open it?

A. Well, we had to work that long before he would say it was clean enough to open and ready.

Q. About how long did you have to work? [643]

A. I worked a good week, maybe 10 days, I know that.

Q. What sort of work did you have to do?

A. Clean it up, scrub them ice boxes and floors, and the ones in the back and the ones up in front and put that sheet aluminum over that meat room and stuff and had some painting done, too; didn't have to have the painting, I guess, but I did, a lot of little things that he said should be done.

Q. Will you describe what, if any, stock of goods was on hand when you went in there?

A. Oh, there were some napkins and stuff upstairs and one case of them was open and one wasn't. Most of the stuff was in the basement, lots of sauerkraut and beets and stuff—canned vegetables that wasn't of any use to me, you know, I didn't want to buy them. A lot of the stuff was left open. There were no great large amount of anything that was useable for my type of feeding anyway.

Q. What did you do with the stock that was on hand, if anything?

(Testimony of Jack Guard.)

A. It was in the basement when I left there.

Q. Just as you had found it?

A. Yes, just as I had found it. I didn't bother it.

Q. Did Mr. Humphries or Mr. Campbell ever ask you to turn it over to them? A. No, no.

Q. And when was it that you left there? [644]

A. About the third week in July, I guess.

Q. Was the restaurant licensed when you went there?

A. There was no license on the wall of the restaurant when I went there and I came down here to the Federal Building and got license for the restaurant and took them up.

Q. Can you estimate in dollars what the average stock of consumable goods was during the time that you were working for Humphries?

A. It would be hard to estimate that because I was only there four or five days. I think I was in the basement but there never was no large amount of stock in that Panhandle at any time because there is not room to get it unless you lug it all down stairs. There is no room for a large amount of stock in that upstairs part where the cafe was.

Q. Will you describe how you got to the downstairs storeroom?

A. Well, you could slide stuff down from that back there—the chute—or you could go down the stairways—through the stairway going to the furnace room.

(Testimony of Jack Guard.)

Q. Now the stairway that you refer to, is that the one at the end of the bar?

A. In the little room next to the end of the bar, yes.

Q. Where is the chute that you refer to?

A. Well, it was going to the back storeroom of the restaurant. The restaurant had a storeroom. There was an old chute fixed [645] there like, I covered it up.

Q. Were there any steps in it?

A. Not to my knowledge unless put them in, I never did go down that way.

Q. Did you ever see anybody go down that way?

A. They had taken stuff down that way before.

Q. Had you ever seen anybody bring anything up that way?

A. I can't recall that I did but I know the dishwashers used to slide stuff down that way, maybe go down, I don't know, before I got there.

Q. Were there any gambling—any card tables on the premises? A. At what time?

Q. When you were working for Humphries?

A. Never seen no gambling in the Panhandle for years. There was some old tables people used to sit around that people used to eat at.

Q. How many, do you recall?

A. Surely wouldn't have been room for over one in there after they remodeled, used to be two there years ago sitting there.

Q. What did you do with the tables when you took over the restaurant or with the table?

(Testimony of Jack Guard.)

A. I guess that table wasn't there when I took over. I put a table in there for the restaurant—a nice table with [646] chairs and I guess that card table wasn't even in there then.

Q. What kind of table did you put in?

A. One that I sold to Joe.

Q. Where did you buy it?

A. At Wolfe's Hardware.

Q. And what happened to it when you left the premises?

A. When I left it was still there. I sold it to Glen and Joe.

Q. Did they pay you for it? A. Yes.

Q. Do you remember how much?

A. It was around \$75.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

Juror: When did you take over the Panhandle Restaurant?

The Witness: About the first day of June, it was either the last day of May or first of June, I opened but I was around there about ten days cleaning it up before we opened.

Juror: What year?

The Witness: 1948.

The Court: That is all, sir. Another witness may be called.

Mr. Cottis: Mrs. Guard.

RUTH GUARD

called as a witness in behalf of defendants, being duly sworn, [647] testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you state your name, Mrs. Guard?

A. Ruth Guard.

Q. What do you do for a living?

A. Waitress work.

Q. Whereabouts are you working now?

A. At the Cheechako.

Q. How long have you been working there?

A. Well, this last time since April. I have been working there off and on for the last three years.

Q. You are a waitress connected with the restaurant there, are you? A. Yes.

Q. Are there any card games at the Cheechako?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection is sustained.

Mr. Cottis: Your Honor, anything which would bear on the effect of card games on restaurant business, I think, should be heard.

The Court: We will be here until next Christmas once we open the door to other places besides the Panhandle. Objection is sustained.

Mr. Cottis: Very well. [648]

Q. Do you know the plaintiff, Vern Humphries?

A. Yes.

Q. Do you recall when you first became acquainted with him? A. Yes.

(Testimony of Ruth Guard.)

Q. When was it?

A. Well, when my husband went to work for him.

Q. And do you remember about when that was?

A. No, I can't recall just when it was.

Q. Can you approximate what time of what year it was?

A. It must have been in June last year.

Q. Of 1948? A. May or sometime.

Q. Were you in the Panhandle premises frequently? A. Yes.

Q. That is, while your husband was working there, was it?

A. Well, not only that, I had been in there before.

Q. Did you ever see any card games going on in the Panhandle?

A. I never paid any attention to them.

Q. Did you ever see any evidence of disturbance between Joe Blackard and Vern Humphries in there? A. No.

Q. Did you ever see any evidence of disturbance between your husband, Jack Guard, and Vern Humphries in there? A. No.

Q. Do you recall what shift your husband was working when [649] he worked for Humphries?

A. I think it was relief but I am not sure.

Q. And what hours would you mean by that?

A. Well, different shifts for different people, I don't know for sure just what shift he did work.

(Testimony of Ruth Guard.)

Q. When your husband took over that restaurant did you work there with him? A. Yes.

Q. During that time were there any card games on the premises that you recall? A. No.

Q. Did you have any written agreement with Blackard or Phillips when you and your husband operated the restaurant? A. No.

Q. Who paid for the fuel and heat—stove heat—while you were operating?

A. We paid for the oil for the range.

Q. Did you pay any electricity bills?

A. One or two, I think is all, one, I think.

Q. What about water, do you remember?

A. We didn't pay water that I know of.

Q. Do you remember how many electric meters were connected to the premises?

A. No, I don't.

Q. Did you have to make any electricity deposit with the [650] city?

A. I believe Jack made one, I am not sure.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all, you may step down, Mrs. Guard. Another witness may be called.

Mr. Cottis: Could we have a short recess, Your Honor.

The Court: Court will stand in recess for five minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

C. WESLEY HEVERLING

called as a witness on behalf of the defendants,
being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is C. Wesley Heverling?

A. Yes, sir.

Q. What is your occupation, Mr. Heverling?

A. Co-owner of City Fuel.

Q. You are a partner in City Fuel, are you?

A. That is right.

Q. Did you during the spring of 1948 have any dealings with Vern Humphries in connection with your fuel oil business? A. I did. [651]

Q. Can you tell the Court what deliveries of fuel you made to Humphries?

A. Can I refer to——

Q. Certainly, refresh your memory with anything you happen to have?

A. These are records off of the ledger. I made deliveries to him through the months of April and ended in May 7th.

Q. You have the quantities of the deliveries and the dates?

A. Not all of them, not from the start.

Q. Do you have them during that period of time that you just referred to? A. I do.

Q. Would you tell us what they were?

A. There was on April 7th, I delivered 196 gallons and April 14th I delivered 188 and April 21st

(Testimony of C. Wesley Heverling.)

I delivered 195½ and April 28th I delivered 214, and May 7th, which was the last, I delivered 234.

Q. Now, how did that come to be the last delivery?

A. I had an agreement with Mr. Humphries that in his business if he took care of his bill monthly and promptly the oil would be continued to be put in the tank and I would be responsible and take care of the tank; in other words I watched it. I would check it at times to see that it wasn't empty, and why the last delivery was made, which was May 7th, he had failed to take care of the previous month's bill. [652]

Q. Has it been taken care of yet?

A. No, sir.

Q. And that bill ran from what date in April was it?

A. April 7th to including May 7th.

Q. Mr. Heverling, in the plaintiff's complaint in this action that is being tried is the following allegation "That on or about the 5th day of May, 1948 defendants—" meaning Blackard, Phillips and Larry Starns—"—did with deliberate intent to injure plaintiff—" meaning Vernon Humphries and Marvin Campbell—"—maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage." Did any of those defendants ever prohibit the delivery of fuel oil to Humphries or Campbell?

A. No, sir.

Q. When you stopped deliveries was that according to the custom of your concern?

(Testimony of C. Wesley Heverling.)

A. That is right.

Q. Also in the complaint is stated the following "That the defendants—" meaning Blackard, Starns and Phillips "—wilfully and maliciously injured plaintiff's credit rating, much to plaintiff's damage." Did any of the defendants ever talk to you about Humphries' or Campbell's credit?

A. No, sir.

Q. Did anybody injure Humphries credit so far as you were concerned? [653]

A. No, sir.

Q. Do you know what your concern's views of Humphries' credit rating were prior to April, 1948?

Mr. McCutcheon: What was that question, again? Excuse me, I didn't follow the question, Your Honor.

The Court: Reporter may read the question.

(Question read.)

The Witness: Just in regards to myself in business?

Q. (By Mr. Cottis): What were your own business views?

A. Rather slow.

Q. That is, he was a slow credit risk?

A. That is right.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: That is all; another witness may be called.

Mr. Cottis: Call Mr. Harold Bliss.

HAROLD BLISS

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Harold Bliss?

A. Yes, sir.

Q. And you own the Bliss Construction Company here in town? [654]

A. Yes, sir.

Q. Mr. Bliss, do you know the plaintiff, Vern Humphries?

A. Yes, sir.

Q. Did you ever have any business dealings with him in connection with the Panhandle Restaurant?

A. Yes, sir.

Q. Will you relate to the Court what those dealings were?

A. Well, we were doing some work there for Mrs.——

Q. Will you state that again. Sit a little nearer the microphone, Mr. Bliss?

A. We were doing some work for Mrs. Campbell repairing and placing floor and different work on the building and Mr. Humphries had taken over the restaurant there and asked us to rebuild the bar in there. They moved it from the front to the rear of the building and we done this work for him and several little jobs around the building. Also there was quite a lot of plumbing that had to be done and he wanted us to handle that for him and

(Testimony of Harold Bliss.)

we got the Anchorage Insulation to do the plumbing work.

Q. Can you recall about when all this occurred?

A. I couldn't give you the dates of it; it was during this time that we were working on Campbell's place. It would be in the winter of '48, I believe.

Q. Were you doing any work on the premises besides the work you were doing for Campbell and the work you were doing for Humphries? [655]

A. Yes, we done some work there for Joe Blackard on his back bar and remodeling the front of the building.

Q. Did you do any work for Larry Starns?

A. No.

Q. Now, did you ever send a bill to Mr. Humphries for your work? A. Yes.

Q. Do you know whether or not he ever received it?

A. Why, yes, he must have received it because he called us up and we questioned some things on the bill and I had the foreman who was on the job go down there with me and he talked to Mr. Humphries about it and the foreman pointed out to Mr. Humphries where these things went that he had questioned, formica and stuff like that that was used on the bar.

Q. Back—by "bar" you are referring to the restaurant counter, are you?

A. To the restaurant, yes, to the counter.

(Testimony of Harold Bliss.)

Q. Where did that conversation between you and Humphries and your foreman take place?

A. It was in the rear of the room there. We sat down at one of the tables in there and talked it over and Mr. Humphries acknowledged that the stuff was in the building that entered into the counter and had been used there.

Q. After the discussion was there any further dispute about the bill? [656]

A. There was no particular dispute about the bill, only that it was never paid.

Q. Well, were there any further questions raised by Mr. Humphries about that bill at any later time?

A. Not that I recall.

Q. How much was the bill altogether?

A. It came to \$3,005.89, I believe it was.

Q. Did Mr. Humphries acknowledge that he owed you that bill? A. Yes.

Q. Is there any doubt in your mind, Mr. Bliss, that the Mr. Humphries with whom you had that conversation is the gentleman sitting here?

A. No.

Q. It is the same man?

A. Same man, yes.

Q. And did you testify that he 'phoned you about the bill before this discussion?

A. I don't remember whether that he 'phoned or whether we called there about the bill.

Q. How long did this discussion last, do you remember?

(Testimony of Harold Bliss.)

A. Oh, I should imagine maybe ten minutes or so, it wasn't very long.

Q. Whatever happened to the bill, has any part of it been paid?

A. Yes, after we tried to collect the bill several times [657] from Mr. Humphries without any success, Mr. Blackard came to me and said he would assume the bill. We assigned it to him and he gave us a promissory note and he has paid part of it.

Q. Do you know how much he has paid on it?

A. \$1500 paid on the bill.

Q. And that was paid by Blackard?

A. By Blackard, yes.

Q. Did you have any conversation with Blackard before he offered to assume the bill?

A. Yes, I was in there one day to try and collect from Mr. Humphries and I mentioned to Mr. Blackard we were going to have to do something about this bill if it wasn't taken care of.

Q. That you were going to have to do something about the bill?

A. Yes, I mentioned it to Mr. Blackard.

Q. And what sort of thing were you talking about that you would have to do?

A. Well, we were figuring that we might have to attach the restaurant part of the building or file a lien on the building. It was plumbing and that would be subject to lien.

Q. And about how long was it after that con-

(Testimony of Harold Bliss.)

versation that Mr. Blackard offered to pay you the bill?

A. Oh, I wouldn't remember exactly, I imagine ten days or two weeks, something like that, it wasn't too long. [658]

Q. Do you recall any discussion that took place among you and Mr. Blackard and myself at my office with reference to that bill? A. Yes.

Q. Can you remember the substance of the conversation and tell it to the Court?

Mr. McCutcheon: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection is sustained unless the counsel is attempting to impeach the witness.

Mr. Cottis: No, I am not, Your Honor.

The Court: Objection is sustained then.

Q. (By Mr. Cottis): Do you have a copy of the assignment that was made by you to Blackard of the Humphries' account? A. Yes, sir.

Q. And do you have the original of the promissory note that Blackard gave to you?

A. Yes, sir.

Q. Do you have them with you?

A. Yes, sir.

Q. May I see them? Have these been in your possession since they were signed?

A. Yes, sir.

Mr. Cottis: May I have this marked for identification. [659]

The Clerk: Defendants' Exhibit D for identification.

(Testimony of Harold Bliss.)

The Court: What is that?

Mr. Cottis: That is a promissory note, Your Honor.

Mr. Cottis: May I have this assignment marked for identification.

The Clerk: Defendants' Exhibit E for identification.

Q. (By Mr. Cottis): Mr. Bliss, referring to the promissory note which has been marked for identification as Defendants' Exhibit D, is that the promissory note which was delivered to you by Mr. Blackard at my office? A. Yes, sir.

Mr. Cottis: I offer this in evidence, Your Honor.

Mr. McCutcheon: No objection.

The Court: It may be admitted.

Mr. Cottis: Will the Court give me permission to substitute a copy for it?

The Court: Yes, a certified copy may be substituted and the original may be returned to Mr. Bliss.

Mr. Cottis: Certified by attorneys?

The Court: No, by the Clerk. The Clerk will certify to a copy. Counsel may supply the copy and the Clerk will certify to it and then the original may be returned to the witness.

Q. (By Mr. Cottis): Now, Mr. Bliss, referring to what has been marked Defendants' [660] Exhibit E for identification, that is not the original copy of the assignment is it?

A. No, that was the copy that was given to us

(Testimony of Harold Bliss.)

and the original was left with you, I believe, or Mr. Blackard.

Q. Was this copy given to you at the same time that it assigned the original? A. Yes, sir.

Q. Now, I notice that under the columns for witnesses no names are filled in but the initials R.H.C. and M.C. appear and likewise where the notary public's initials no name is filled in but the initials R.H.C. appear. I show you what purports to be another copy of it with the names filled in, and by refreshing your recollection from this other copy, can you tell me whose names appeared as witnesses on the original of the assignment?

A. From the names filled in—Ralph H. Cottis and Mary Kilroy. Ralph H. Cottis as notary public.

Q. Is that your recollection with respect to the original assignment, Mr. Bliss?

A. I remember your signing it and I believe that the secretary or one in the office there—girls—signed it. I didn't know what her name was.

Mr. Cottis: Your Honor, I have been unable to produce the original copy of that assignment although I have searched my file diligently and I would like to offer in evidence this [661] copy which has been in Mr. Bliss' custody.

The Court: I think, counselor, it will be necessary to have some sworn testimony. Your statement—while I do not personally question your statement, it would be out of order upon the testi-

(Testimony of Harold Bliss.)

mony of this witness now to submit a copy unless counsel stipulates that it is a true copy and may go in.

Mr. McCutcheon: No, I don't wish to stipulate as to a copy, Your Honor.

The Court: I think there must be sworn proof that the original cannot be found.

Mr. Cottis: Well, perhaps Your Honor would swear me when we are through with Mr. Bliss.

The Court: Very well. Is counsel sure that the original is not in some of the files in this case?

Mr. Cottis: No, I am not. I have gone through them twice and I have not seen it, but I have a recollection of having seen it a few days ago in one of the Court's files and it might be that I overlooked it.

The Court: I recall seeing something but it may well have been what is purported to be a copy.

Mr. Cottis: There is a copy in one of the files.

The Court: That is probably what I saw.

Mr. McCutcheon: May I see the copy?

The Court: Yes, certainly, you may examine it.

Q. (By Mr. Cottis): Mr. Bliss, how long have you been in business in Anchorage?

A. Since '21.

Q. Now, what happened to the Anchorage Insulation bill for plumbing?

A. We had to pay it.

Q. That is, Bliss Construction Company had to pay it?

A. Yes.

(Testimony of Harold Bliss.)

Q. In other words, Anchorage Insulation was a subcontractor on the job?

A. Yes, they would be in that.

Q. And that has been paid? A. Yes.

Q. Was there ever any complication, Mr. Bliss, in doing the work for Mr. and Mrs. Campbell—in doing the work for Humphries and in doing the work for Blackard—was there ever any complication as to what work was being done for whom?

A. No, nothing very serious. There was something I believe at the time—had to straighten it out—which was going to pay for which item, that is, between Blackard and Mrs. Campbell, I believe was the only question that was raised.

Q. And did the question between Blackard and Mrs. Campbell get straightened out?

A. Yes.

Q. There was never any question about the work that was done [663] for Humphries?

A. Not that I know of.

Q. Do you recall what of your men were on the job down there?

A. Mr. Schroeder was the foreman and one of the carpenters was Arden Bell. I believe Frank Worden was one carpenter that worked there. I can't recall all of them.

Q. Is that all you can recall right now?

A. I think that is all that I could be sure of.

Q. Now, can you recall what rates—what hourly rates—your company paid Anchorage Installation for the work that they did for Humphries?

(Testimony of Harold Bliss.)

A. No, I don't recall just what the scale was at that particular time.

Q. Do you recall whether it was all straight time?

A. We paid the union scale, whatever the union scale was at that time.

Q. Was there any overtime connected with it that you remember?

A. I don't think we done very much overtime but the plumbers were kept on the job overtime, worked all one night there.

Q. How many of them, do you remember?

A. I think there was four plumbers.

Q. Who kept them there working all night?

A. Mr. Humphries.

Q. And do you remember what hourly rates they charged for that work? [664]

A. Well, goes double time for whatever the rate, I don't remember.

Q. Can you remember within a couple of dollars an hour what the rate was?

A. I think the straight charge was \$4.50, that would make it \$9 or \$10, something like that would be the charge per hour.

Q. \$9 or \$10 per man per hour? A. Yes.

Q. And, again, who was it who kept the men there working at night?

A. Mr. Humphries had these men work there.

Q. And that is part of the bill that Bliss Construction paid, is that right? A. Yes, sir.

Mr. Cottis: Your witness.

(Testimony of Harold Bliss.)

Cross-Examination

By Mr. McCutcheon:

Q. Mr. Bliss, you say that you didn't do any work for Mr. Starns, is that correct?

A. That is correct.

Q. It was for Mr. Blackard?

A. Mr. Blackard, yes.

Q. Mr. Blackard, you did business with him, did you?

A. Done—we done the work for Mr. Blackard on his back bar and put in the front of the building. [665]

Q. That was for Mr. Blackard? A. Yes.

Q. Mr. Starns never had anything to do with that?

A. We had no dealings with Mr. Starns whatever.

Q. None whatever?

A. Not on that building.

Q. Is your memory clear on that?

A. Yes.

Q. Would you recognize your bookkeeper's handwriting, Mr. Bliss?

A. I wouldn't know about that.

Q. What is your bookkeeper's name?

A. Why, Miss Clay is the present bookkeeper.

Q. What was your bookkeeper's name in 1948, March, April, and May?

A. Mary Moore was bookkeeper at that time.

(Testimony of Harold Bliss.)

Q. I hand you a piece of paper, do you see Mary Moore's name on that piece of paper?

A. Yes.

Q. What is that piece of paper?

A. It is one of our billheads.

Q. And who is it directed to?

A. Panhandle front.

Q. And who else?

A. Blackard and Starns. [666]

Q. I hand you another piece of paper and ask you to tell me what that is?

A. These are invoices?

Q. And who are they directed to?

A. Panhandle Bar, Blackard and Starns, but all of our dealings was with Blackard.

Q. I hand you another piece of paper and ask you what that is?

A. That is an itemized list of all the invoices.

Q. And who is it directed to?

A. It is directed to Blackard and Starns.

Q. Mr. Bliss, is that your handwriting at the top of that page? A. Yes.

Q. And is that a part of the invoice that is directed to Blackard and Starns?

A. That would be a part of the list.

Q. Did you ever have occasion to do business with Mr. Glen Phillips?

A. The only thing that I ever had to do with Glen Phillips was I called there in regard to payment on the building that Mr. Blackard and Mr. Phillips made a payment of \$250 on.

(Testimony of Harold Bliss.)

Q. On this account? A. Yes.

Q. Then you had some business dealings with Mr. Phillips? [667]

A. That was several months after the time—at the time we done the work I never even known Mr. Phillips or that he had anything in connection with the bar.

Q. Did you at that time learn that he was connected with the bar? A. I beg your pardon?

Q. Did you at that time when he made the payment on the bill that was originally charged to Mr. Humphries, did you then know that Mr. Phillips was connected with the bar?

Mr. Cottis: I object, counsel is testifying again.

Mr. McCutcheon: Well, I don't believe I am, Your Honor.

The Court: I didn't understand the answer of the witness as to the circumstances under which he received the \$250. The witness gave no testimony that this was Humphries' bill and therefore the objection was sustained.

Q. (By Mr. McCutcheon): You stated that Mr. Phillips and Mr. Blackard made a payment on a bill, did you not, Mr. Bliss?

A. Mr. Phillips made the payment on the bill that Mr. Blackard had given this note on.

Q. And that was the bill that was originally charged to Mr. Humphries, was it? A. Yes.

Q. And did you then know that Mr. Phillips was connected with that business? [668]

(Testimony of Harold Bliss.)

A. He mentioned it at the time that he was one of the partners in the business.

Q. You understood that because he paid part of the bill, isn't that correct?

A. I understood from talking with Mr. Phillips that he was one of the partners.

Q. Mr. Bliss, will you tell me what this article is?

A. This is a check for \$500.

Q. And who signed the check?

A. Signed by Glen E. Phillips.

Q. And was it at that time that you just mentioned a moment ago when Phillips and Blackard paid you a part of the bill?

A. No, sir.

Q. That is at a different time?

A. Well, Phillips is evidently has sent in this check. It was sent in through the office. I wouldn't know about all the checks that come through who signed them.

Mr. Cottis: May I see the check?

Mr. McCutcheon: Well, I haven't offered it in evidence, if the Court please, but I have no objection to counsel seeing it.

Mr. Cottis: Thank you.

Mr. McCutcheon: May I have just a moment, Your Honor?

The Court: All right.

Q. (By Mr. McCutcheon): Again, Mr. Bliss, will you tell me what this is?

A. That is an itemized list that is made from the invoices.

(Testimony of Harold Bliss.)

Mr. Cottis: What is your answer?

The Witness: It is an itemized list that was taken off from the invoices to show just what material and labor was furnished at the Panhandle Bar.

Q. (By Mr. McCutcheon): And that is directed to Blackard and Starns, is it?

A. It is assigned to Blackard and Starns, although all of our dealings was with Mr. Blackard.

Q. I understand that. That is your signature on the second page, is it not? A. Yes.

Mr. McCutcheon: I would like to offer that article in evidence.

The Court: Will you show it to counsel for the defendants?

Mr. Cottis: Your Honor, I have no objection if Mr. McCutcheon will offer all of these items in evidence but to this single item I object on these grounds: (1) I fail to see the relevance; (2) It is partly illegible; and (3) There has been no testimony about the custody of this document. I don't know where it is produced from. If he will put them all in evidence I have no objection.

Mr. McCutcheon: If counsel will wait with his objection I will get there. [670]

Q. Mr. Bliss, I again hand you——

The Court: Wait, is counsel prepared to offer all of these papers in evidence?

Mr. McCutcheon: Yes, sir.

The Court: That seems to remove one objection, and the others are overruled.

(Testimony of Harold Bliss.)

Mr. Cottis: Your Honor, I wasn't referring to all of those papers. I was referring to these other documents which he has been questioning Mr. Bliss about.

The Court: My question was directed to that. Do you intend to offer all of these?

Mr. McCutcheon: I now make the offer.

The Court: They may all be admitted.

Mr. Cottis: May I see the other ones—the checks?

The Court: Yes.

Mr. McCutcheon: Did Your Honor mean this sheet of articles or papers or all that I held in my hand, sir?

The Court: No, will you show those to counsel? It is my understanding that counsel for defendants said he would have no objection if all the papers were offered in evidence?

Mr. Cottis: All of the papers that have been shown to Mr. Bliss, including the checks?

The Court: Yes.

Mr. Cottis: And the other checks.

Mr. McCutcheon: That was the only check shown, counselor. [671]

Mr. Cottis: Very well.

The Court: Without objection all of these papers are admitted in evidence and may be marked.

Q. (By Mr. McCutcheon): Mr. Bliss, is that the check I showed you a moment ago?

A. Looks like it, yes.

Q. Did I show you any other check?

(Testimony of Harold Bliss.)

A. No, sir.

The Court: First paper offered will be marked Plaintiff's Exhibit No. 19 and the others that follow in their regular sequence. First paper is a three-page document. What was No. 20 supposed to be—a check?

Mr. McCutcheon: No. 19 purports to be a job sheet, Your Honor.

The Court: Could that be called an invoice, Mr. Bliss or is an invoice something else?

The Witness: An invoice is something else.

The Court: That is a job sheet?

The Witness: Job sheet is just a recap of the invoices.

Mr. McCutcheon: No. 20 is a check payable to the Bliss Construction Company signed by Glen Phillips, Your Honor. 21 is a statement directed to Blackard and Starns.

The Court: Has the witness testified to that? I think it should be shown to the witness.

Mr. McCutcheon: The witness has testified. I assume [672] I have the right to read it to the Jury, Your Honor?

The Court: Surely.

Mr. McCutcheon: It is entitled "Statement."

The Court: What is 22?

The Clerk: 22 is the Bliss Construction Company.

The Court: If there is any doubt the witness should testify.

(Testimony of Harold Bliss.)

Q. (By Mr. McCutcheon): Mr. Bliss, will you state what those papers are, please?

A. They are invoices.

The Court: Is that all or is there a 23?

Mr. McCutcheon: There are four exhibits, Your Honor.

Mr. McCutcheon: I would like to know if counsel will stipulate that they may go to the jury without reading?

Mr. Cottis: May I seem them again? Your Honor, I will stipulate that they do not need to be read to the Jury.

The Court: Very well. How many are there? What is the last one?

The Clerk: 22, Your Honor. That is a packet of invoices.

Mr. McCutcheon: No further cross-examination.

The Court: Any further direct examination?

Redirect Examination

By Mr. Cottis:

Q. Now, Mr. Bliss, referring to Plaintiff's Exhibit 22, which is a sheaf of invoices here, I would like to know whether [673] the yellow color has any significance?

A. The yellow color is the duplicate copy.

Q. And according to your office procedure what happens to its duplicate copy?

A. Duplicate copy is the one that is sent out—that is mailed to the customer.

(Testimony of Harold Bliss.)

Q. What happens to the first original copy?

A. The original copy is kept for our own records.

Q. In your office, then, would you have the first copy of each of these invoices?

A. I think so.

Q. Would you also have in your office the original copies of any invoices that were made out to Humphries?

A. Yes, sir.

Q. I hate to impose upon you, Mr. Bliss, but could you bring those down to the Court this afternoon?

A. It may take sometime to look them up, I don't know, it has been sometime ago.

Q. Would you have them by next Tuesday?

Mr. McCutcheon: Next Tuesday, did you say, Mr. Cottis?

Mr. Cottis: Yes.

Mr. McCutcheon: Do you anticipate that this trial will go until next Tuesday?

The Court: If it continues over from today it is bound to go until next Tuesday if we do not finish today and I see [674] no immediate prospect of it.

Mr. McCutcheon: Well, I didn't hope to spend the 4th of July in the Court room, sir. I see counsel's point.

The Court: I feel constrained to go elsewhere tomorrow and so next Tuesday will be the next day of jurisdiction of the Court at Anchorage so far as I am aware.

(Testimony of Harold Bliss.)

Q. (By Mr. Cottis): Mr. Bliss, would it be possible to dig those things up by next Tuesday?

A. I can dig them out but I expect to be out of town next Tuesday.

Q. What did you say the name of your present bookkeeper is? A. Frances Clay.

Q. Would she be available to bring them down here? A. I think so.

Q. Will you have her do it, Mr. Bliss, by next Tuesday. That is, your office original copies of Plaintiffs' Exhibit No. 22, which is comprised of invoices bearing your stamp numbers 6089, 6103, 6116, 6133, 6142, 6158, 6046, 6068, 6077 and 6136, and I will make a list of those for you, Mr. Bliss, and also your office copy, if you have one, of Plaintiffs' Exhibit No. 21?

A. There isn't any office copy of statements.

Q. There would be no office copy of this Exhibit 21? A. No. [675]

Q. In your customary procedure would there be any office copy of this Exhibit 19, which is marked Job Sheet? A. Not ordinarily, no.

Q. Would you also instruct your girl to produce anything else that she might find in connection with work done at the Panhandle whether it was for Humphries or for Blackard or for Mrs. Campbell? A. Yes.

Q. Now, Mr. Bliss, do you recognize the handwriting of the inked in words on Exhibit 22?

A. No, I couldn't testify as to the handwriting.

(Testimony of Harold Bliss.)

Q. You don't know whether it is Miss Moore's handwriting or not? A. No, I wouldn't know.

The Court: Where is Miss Moore now?

The Witness: She is outside in California, I believe.

Q. (By Mr. Cottis): Here is the list of those invoice numbers, if that will be any help to you or your office force. Mr. Bliss, can you explain how those bills, if they were so addressed, happened to be addressed to Blackard and Starns?

A. No, I wouldn't know just why they were addressed to it because all of our dealings was with Mr. Blackard. Mr. Starns was putting in a liquor store in the building at the same time and we understood from Mr. Blackard that Starns was going to [676] reimburse him for part of the front that was put in.

Q. So, as far as your relationship with either of them was concerned did Mr. Starns ever pay you any part of your bills?

Mr. McCutcheon: I would like to ask the Court to strike the testimony with reference to what Mr. Blackard told Mr. Bliss.

Mr. Cottis: He didn't testify as to what Mr. Blackard told him.

Mr. McCutcheon: Read it back.

(Answer and question put were read)

Mr. McCutcheon: That is what I object to.

The Court: Overruled.

Mr. McCutcheon: Objected to as leading.

(Testimony of Harold Bliss.)

The Court: Overruled.

Q. (By Mr. Cottis): Did Mr. Starns ever pay you any part of the bills on this work, Mr. Bliss?

A. No.

Q. Did Mrs. Campbell pay you for some of the work that you were doing at that time?

A. Yes.

Q. Did Mr. Humphries pay you for any of the work that was done at that time? A. No.

Q. Did Mr. Blackard pay you for any of the work that was done at that time? [677]

A. Yes.

Q. Were those three jobs billed separately by your office? A. Yes.

Q. That is, one appropriate bill went to Mrs. Campbell, is that correct? A. Yes.

Q. And then a completely separate bill went to Mr. Humphries, is that correct? A. Yes.

Q. And a completely separate bill went to Mr. Blackard, is that correct? A. Yes.

Q. Did Mr. Blackard or Mrs. Campbell question any items on their bills?

A. Mrs. Campbell's son questioned it a little bit and I explained to him what it was and he o.k.'d the bill and paid it. He was acting as her agent.

Q. Did Mrs. Blackard question anything on his bill? A. No.

Q. Did you ever have any discussion with Starns about this work? A. No.

Q. Did you ever have any discussions with Starns about payment for any of the work?

(Testimony of Harold Bliss.)

A. No. [678]

Q. And no payment ever was received from Starns? A. No.

Q. Do you know how these invoices that have written on them in ink "Blackard and Starns"—do you know how they were delivered and to whom?

A. No, I don't

Q. You don't know whether they were put in the mail or not? A. No, I don't.

Q. Do you know whether your office has sent to Mr. Blackard any statement of the balance owing on the Humphries' bill?

A. No, I don't know personally.

Q. The Blackard bill has been paid completely, has it, that is for the work that was done on the bar for Blackard?

A. Yes, the bar work that was done on the bar was paid for complete.

Q. And Starns paid no part of it? A. No.

Q. There is some balance owing on the Humphries' bill that Blackard has been paying off?

A. Yes, sir.

Q. And will you state again about what that balance is?

A. It would be about 1500-dollars plus interest.

Q. Since Blackard assumed that Humphries' debt to you, have you had any further discussions with Humphries about it? A. No. [679]

Mr. Cottis: No further questions.

The Court: Any further cross-examination?

(Testimony of Harold Bliss.)

Mr. Cottis: May I have just a moment, sir?

Mr. McCutcheon: No cross-examination.

Juror: Mr. Bliss, have you done any building for Starns in the past few years?

The Witness: No.

The Court: That is all, Mr. Bliss, you may step down.

Mr. Cottis: Mr. Moon.

CHARLES E. MOON

called as a witness on behalf of the defendants, having been duly sworn testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Charles E. Moon, is that right?

A. Yes, sir.

Q. Doctor Moon, what was your—during April of 1948 were you the Sanitation Officer for the City of Anchorage?

Juror: Mr. Moon was in the Court room around eleven o'clock today.

Q. (By Mr. Cottis): How long were you in the Court room this morning?

A. I don't know how long, I imagine ten minutes.

Q. Do you recall who was testifying?

A. Mr. Bliss.

Q. Have you been in the Court room during this trial at [680] any other time?

(Testimony of Charles E. Moon.)

A. One other time when I was subpoenaed Monday when I came up—was it Monday—the 22nd for about two or three minutes.

Q. Who was testifying then do you recall?

A. I don't recall.

Q. Do you remember what the testimony was about?

A. No, I don't, I wasn't paying any attention to that. I was trying to get Mr. Blackard's attention to find out what I was to do, since he had subpoenaed me.

Mr. McCutcheon: If the Court please, I would like to exercise my right to object to the testimony of the witness on the grounds that he has heard testimony heretofore. I don't know what to anticipate in way of testimony from Dr. Moon, but I would object to it at this time. The Court declared on motion of the plaintiff, myself, at the beginning of the trial the Court declared that all witnesses must be absent and remain absent and the Court admonished both counsel to make sure that their witnesses were absent from the Court room and, if the Court please, I was very diligent in that and kept all my witnesses out of the Court room, and I at this time object to the testimony of this witness on that ground.

Mr. Cottis: Your Honor, may I submit that Dr. Moon is here entirely as a Sanitation Officer and his testimony would have no connection with anything that Mr. Bliss was inquired from. [681]

(Testimony of Charles E. Moon.)

The Court: Did you hear the declaration of the Court that all witnesses should remain out of the Court room during the course of the trial?

The Witness: No, sir, I didn't.

The Court: Although the rule was made and the Court is disposed to enforce it I am unable to see that what Dr. Moon may have heard of the testimony of Mr. Bliss could in any wise affect his testimony.

Mr. McCutcheon: Before your Honor rules, I realize that perhaps there is no connection between the two, however, the Court established a rule by which both counsel are bound and I submit that it is unfair to the plaintiff to make an exception of witness for the defense.

The Court: The only exception that is made is one based upon reason that would be made impartially of course for a witness for either side and in this particular case if the witness has anything of value to offer I think it ought not be excluded by the accident——

Mr. McCutcheon: Will your Honor hear me further?

The Court: Yes, wait until I finish and I will be glad to hear counsel—that he was in the Court room—for how long did you say, about ten minutes?

The Witness: About ten minutes.

The Court: ——and heard the testimony of a witness who was testifying to another feature of the case entirely.. The [682] reason for the rule is to prevent one witness from listening to another and

(Testimony of Charles E. Moon.)

then consciously or unconsciously supporting or contradicting the testimony of the other witness. Now, I will be glad to hear Counsel.

Mr. McCutcheon: If the Court please, my motion is one privileged. The motion that was made at the beginning of this trial was one privileged by statutory law, as I remember, and the motion was made in good faith. Counsel for the plaintiff has followed the Court's order diligently in that respect and I submit, sir, that if the Court were to look into the fact as to whether or not the testimony of a witness on the stand would in any way influence the witness that was overhearing the testimony it would then be necessary, sir, for us to go into the entire merits of the thing each time a witness were called to the stand, whether it was ten minutes or two days, sir, and I restate my objection.

The Court: I think the matter is within the sound discretion of the Court and the business of the Court is to promote justice, after all. It is true that the rule is based upon the statute but I am convinced, and in this I am sustained by rulings made by Judges before Counsel before in this very Court, that the Court does have the discretion, and I have noted it to be exercised when it seems clear without any shadow of a doubt that the opposite party cannot be prejudiced, cannot be hurt, by the fact that a witness inadvertently has been in [683] the Court room and has heard some testimony. At any rate the objection will be overruled and the

(Testimony of Charles E. Moon.)

witness will be permitted to answer. And, of course, in this, as in every other case, an exception is taken as of course. Counsel may proceed.

Q. (By Mr. Cottis): Dr. Moon, in April of 1948 were you the Sanitation Officer for the City of Anchorage? A. Yes.

Q. In connection with your duties as such Sanitation Officer did you have occasion to visit the Panhandle Bar and Cafe during April or May of that year? A. Yes, I did.

Q. Do you recall what date it was?

A. No, I don't know the exact dates. It was short—as I remember the Panhandle was shut down for a period of time and remodeled and after they remodeled it was shortly—it was while they were remodeling that I visited it several times and shortly after that.

Q. And did you ever visit it after it had opened? A. Yes, I did.

Q. Will you describe what conditions you found?

A. Well, when they opened it it was in a pretty fair condition, that is, from a sanitary standpoint, and the longer it opened it run down quite fast, that is, and the condition of the premises got progressively worse. [684]

Q. Did you ever have to take any drastic action with respect to the premises?

A. Well, it was always my policy when I was Sanitarian to never take any drastic action on any establishment unless I had first given the operator

(Testimony of Charles E. Moon.)

sufficient time to clean up the place and get it into a good sanitary condition.

Q. On that connection did you have any discussions with the operator of the Panhandle Cafe at that time?

A. Yes, I talked with Mr. Humphries and pointed out what he was doing wrong and made the suggestion that he clean them up and get them straightened around.

Q. And was that done?

A. Well, he seemed to be the type of an individual that would——

The Court: Answer the question, Doctor.

The Witness: Well, he would clean them up if he saw me coming; in other words, if he didn't think I was going to be there it wasn't in too good a shape and when I would let him know that I was coming he would have it in pretty good order.

Q. (By Mr. Cottis): Did there ever come a time when you had to condemn anything on the premises?

A. Yes.

Mr. McCutcheon: Objected to as leading. [685]

The Court: Overruled.

The Witness: Yes. Yes, I did, one night I did after Mr. Blackard evidently was having some trouble and he was quite concerned about the fact that the restaurant part be kept in a good, sanitary condition because he was operating the bar just adjacent to it. And he called me one evening about 8:30, as I remember, and asked me if I would

(Testimony of Charles E. Moon.)

come down and check over the restaurant part of the Panhandle and I went down and at that time I found quite a number of food particles that were in very bad condition.

There was liver there—three or four pounds of liver—that had micrococci the size of a dollar and larger that were green-yellow. Now whether Mr. Humphries was using that to feed or was serving that or not I don't know, but if he wasn't he had no right to have it in an establishment like that.

Also there were some calves brains that had stood around without proper refrigeration in storage that had liquified. They were no longer solid. They were in a gelatinous state. Those were the two things that impressed me most—that was the liver and the brains.

Then at that time the premises in general were in a very poor condition, that is, from a sanitary standpoint it was, things weren't clean at all—refrigerators were dirty, looked as though they hadn't been cleaned in two or three days. The shelves were the same. [686]

Flour bin had mouse droppings in it as did the sugar containers, and in general it was in very poor shape. And at that time because of the condition and because of the previous warnings that I had given Mr. Humphries, I closed the place and I took the foodstuffs that I had condemned or taken out of there—the brains and the liver—I took them out to the City Dump and burned them. I went

(Testimony of Charles E. Moon.)

right out and saw to it that they were destroyed and not used for any other purpose.

Q. (By Mr. Cottis): Now, subsequent to that time did any other operator take over the restaurant?

A. You mean after that?

Q. Yes.

A. Yes, there was another fellow that took it over, it was about two to three weeks after that that he got it cleaned up in shape where I would allow him to open it.

Q. Did you delay his opening?

A. Yes, I did, they wanted to open it as fast as they could so that they could start operating and I wouldn't allow it to be opened until such a time as it was in a clean condition.

Q. Do you recall how long the new operator was delayed?

A. About three weeks.

Q. What did he have to do to the premises to meet your approval?

A. Well, in the back toward the alley on the restaurant side [687] they had to repair the roof. There was an open space going between the refrigerator or the cold box to the restaurant, and it was open to the air and the elements and the rain was dripping down through there so that when it did rain anytime anybody would walk between one place to another there would be drops—rain drippings—from off the roof that had a very good chance of falling down on food that was being carried.

(Testimony of Charles E. Moon.)

Q. Anything else that you can recall?

A. He had to scrub up, I know—clean things down quite a bit. I don't know just what the major other repairs he might have done.

The Court: I think we had better suspend until two o'clock.

Under the law I am compelled to remind you every time you separate that you must not discuss the case among yourselves or with others or listen to any conversation about it and that you must not form or express an opinion about it until it is finally submitted to you. You may now retire and Dr. Moon may step down, and report back at two o'clock.

(Whereupon, at twelve o'clock noon the taking of testimony was recessed until two o'clock p.m. the same day.) [688]

Afternoon Session

The Court: Clerk will call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Dr. Moon may resume the witness stand. Counsel may proceed with the examination.

CHARLES E. MOON

previously called as a witness on behalf of the defendants, having previously been sworn testified as follows:

(Testimony of Charles E. Moon.)

Further Direct Examination

By Mr. Cottis:

Q. Doctor——

Mr. McCutcheon: If the Court please, Dr. Moon asked me a moment ago if he should take the witness stand before your Honor came in and I told him yes.

The Court: That was quite correct. Counsel did not know that another matter had been scheduled for hearing, so it is quite proper for the Doctor to take the witness stand. Counsel may proceed with the examination.

Q. (By Mr. Cottis): Dr. Moon, when you were Sanitation Officer for the City did any custom exist in your office with regard to written reports?

A. Yes, sir.

Q. What was the custom? [689]

A. Any time we made an inspection I also made a written report on that inspection and kept them in the office.

Q. Now, do you have any inspection reports on your inspections of Mr. Humphries' restaurant at the Panhandle?

A. When I got the subpoena with regard to this case I went down to the Health Center to pick those inspection forms up so as to refresh my memory and they weren't there. I don't know what happened to them. They weren't in the files at all. The only inspection form that was down there on the Panhandle was the one that I made after Mr.

(Testimony of Charles E. Moon.)

Humphries had left and Jack Guard had taken over.

Q. None of the Humphries' inspection reports were down there?

A. None of them were, no.

Q. Has anything of that nature ever occurred before in connection with inspection reports, so far as you know?

A. Not so far as I know.

Q. Did the City have a grading system for restaurants at the time you were Sanitation Officer in April and May of 1948?

A. Yes.

Q. Could you tell us briefly what that grading system was?

A. Well, it was the grading system that is recommended by the United States Public Health Service grading restaurants, either Grade A or Grade B or Grade C.

Those in a Grade A classification were those that came up to all of the standards of the grading code.

Those in Grade B came up to all the standards with the exception of a few minor violations and Grade C just about anything went.

Q. Now, was Mr. Humphries' restaurant graded?

A. No, I went—called, or I am not sure whether or not called or Mr. Blackard, but someone from the Panhandle called and wanted the Panhandle Bar inspected to be graded and it never was—it never came up to any of the standards. In putting

(Testimony of Charles E. Moon.)

out these when I was grading them I thought it would be probably fair to the operators of these eating and drinking establishments before I put out any grade cards I first inspected them to give them an opportunity to come up to the Grade A standards before putting a Grade B or Grade C card in their restaurant or bar, whichever it happened to be, and the Panhandle Bar was never graded. That is, it was never given a grade card.

Q. Was that the bar or the restaurant?

A. That was the restaurant.

Q. To the best of your recollection how frequently did you inspect the Panhandle restaurant?

A. Well, at that particular time shortly after Mr. Humphries took charge of the Panhandle I was inspecting it quite frequently because previously he had operated the Mess Hall down in the railroad—for the railroad, and I had myself and Mr. Morley, the Territorial District Sanitarian, had inspected that [691] railroad mess hall and we had had to close it up and Mr. Humphries was operating that one because of that. I thought that if he were to operate a restaurant herein town I wanted to make sure that it were operated in a sanitary condition if it were possible at all. So I was making fairly frequent checks on it.

Q. Was it the sanitary conditions that prevailed at the railroad that led to your closing of that or some other conditions?

A. It was the sanitary conditions, yes.

(Testimony of Charles E. Moon.)

Q. Doctor, at the time you condemned these foods of Humphries' at the Panhandle Restaurant in May did you have any discussion with Humphries?

A. Yes, as I remember now it was about 8:30 when—between 8 and 8:30 when Mr. Blackard came out and asked me if I would go down and check it. And I was down and went over everything and picked out those perishable foods that were decomposed to the extent that they were unfit for human consumption, and we had loaded them onto the pickup to take them out to the dump to burn and Mr. Humphries came in, and I had went back inside into the restaurant part of the building, and Mr. Humphries asked me if I would step out in the alley and talk to him about it and we went out and he was pretty upset because he was cursing and using quite a bit of profanity and we went out and was telling me I had no right to take that food and throw it away, that he had had someone—I don't know who it was, but [692] he had had someone—check that food not too long before I was there and they had said it was in good condition. Who that was I don't have no idea, it was nobody with any authority to do it so far as I know because I checked with the rest of the Health Department officials and I know they wouldn't have done it.

Q. That is, somebody, according to Humphries, had inspected it that same day before you were there?

(Testimony of Charles E. Moon.)

A. Yes, he had said, as I remember, it was only within two or three hours.

Q. Was it anybody connected with the United States Marshal's office, do you recall?

A. Well, I don't know whether it was or not but he asked me if I would go down with him and see the Marshal at that time, and we were talking back and forth and I couldn't see too much reason for me to go down and see the Marshal and we were about to get into his car when the City Police came over and they started questioning him.

Q. Did they search him?

A. Well, they did, they got into the car and they went to open the car door and there was some scuffling and as I remember they got a hunting knife out about so long and they were talking to him and then the next thing I knew the car that Mr. Humphries and four or five other men in the car also, maybe not that many, two—one in the front seat and two in the [693] back seat, as I remember, and the car left and went down the alley and left the police standing there wondering what they were doing, I guess.

Q. Did Mr. Humphries make any threats against you?

A. No, nothing other than just cursing.

Q. Did you see any card tables in operation in the Panhandle premises when you inspected Mr. Humphries' restaurant from time to time?

A. Well, I wasn't looking for any card tables.

(Testimony of Charles E. Moon.)

Now there might possibly have been some card tables as you go into the restaurant or into the restaurant off to the left in the rear, there may have been one or two but I never noticed anybody ever playing cards in there.

Q. Were there any card tables at Humphries' restaurant down at the railroad?

Mr. McCutcheon: Objected to as immaterial.

The Court: Sustained.

Q. (By Mr. Cottis): Was any canned milk condemned that you recall?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled.

The Witness: Is it all right to answer?

The Court: You may answer.

The Witness: Yes, I did take out some canned milk—three or four cans that they had been opened and had been [694] evidently opened for quite a number of days, but that is all, just cans that had been opened is all.

Q. (By Mr. Cottis): Will you tell the Court again what meats you can now recall that you had to condemn or that you did condemn?

A. Well, two types of meat that I remember most distinctly, of course, were those in the worst condition and that was the liver and the brains, and there were also several chicken carcasses that I threw out that were in very poor condition, I mean, in such condition you couldn't get very close to them. You could really get a good smell of them

(Testimony of Charles E. Moon.)

and then there was some corn beef, about 30 pounds of corned beef, and that wasn't in too bad a condition. It had been thrown down on the floor and had dirt on it or had been laying on the floor. It had quite a bit of dirt and I didn't feel that there was any need of taking chances of that being washed off and being fed to someone.

Q. What was the general condition of the restaurant at that time as to cleanliness as to equipment?

A. At that time it was in very poor condition.

Q. What was the condition of refrigerators as to cleanliness?

A. That is where I got some of the foodstuffs was from the refrigerator and the refrigerators weren't in good operating condition, they were very poor, and they didn't look like they had been cleaned out for a week or ten days maybe. [695]

Q. What was the condition of his stoves or ranges as to cleanliness?

A. Well, the stove that they had it was an accumulation of grease behind it that I had mentioned to Mr. Humphries on previous inspections that had never been taken care of and there was a lot of grease that had splattered on the back walls and around the range and onto the floor and been worked in.

Q. And you say that condition had been brought to Mr. Humphries' attention? A. Yes.

Q. Where was it that you found miscellaneous droppings?

(Testimony of Charles E. Moon.)

A. In a barrel that he had some—not a barrel but a drawer that he had his flour and also in some of his sugar.

Q. Who was it made the inspections with you at the railroad messhall?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection sustained.

Mr. Cottis: Your Honor, counsel did not object before.

The Court: He objects now.

Mr. McCutcheon: I think that counsel would be honorable enough to stay away from that subject and knows that it was immaterial.

Mr. Cottis: Your Honor, I ask that that be stricken from the record.

The Court: It may be stricken. [696]

Q. (By Mr. Cottis): Did you have any conversations with Mr. Humphries or Mr. McCutcheon after the closing—after the condemnation of those meats regarding that subject?

A. Yes, the next day or two following, Mr. McCutcheon called and wanted to know what I had thrown out down there, that Mr. Humphries told him it was quite a loss and quite a bit of valuable meats and other foodstuffs. So I went up and talked to Mr. McCutcheon about it and told him what the circumstances were surrounding it and I had a list of all of the foodstuffs that I had thrown away, but I had no idea where is that now.

Mr. Cottis: No further questions.

(Testimony of Charles E. Moon.)

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Dr. Moon, how long had you been engaged by the Territorial Department Health Service?

A. In August or September of 1947.

Q. And you are now engaged in private Veterinary practice here in Anchorage, are you not?

A. Yes, sir.

Q. Now, you have no particular feelings either one way or the other in this case, have you, Doctor?

A. No.

Q. Now, when you testified that you closed the restaurant, [697] you meant that you ordered that the restaurant could no longer operate, isn't that correct?

A. That is right.

Q. And you were informed, were you not, that the restaurant had been closed for several days at the time of your inspection?

A. I found out later, yes, that Mr. Humphries had been operating the restaurant and that the reason that Mr. Blackard wanted me to come down and inspect it was so that I could throw out any foodstuffs that weren't fit to eat, because he wanted somebody else to take over the restaurant the following Monday.

Q. Yes. Now, the meats that were spoiled were not under refrigeration, is that correct, they were thawed?

A. That is right, yes.

(Testimony of Charles E. Moon.)

Q. Now, do you know who removed them from the freezing compartment?

A. No, I had no idea. I do know that the brains—calves brains—couldn't have gotten in that condition in less than four to five days, I mean they had to be out that long to——

Q. Now, you mentioned that your records had disappeared. Where had your records been kept?

A. They were in the files in the Sanitarian's Office at the Health Center.

Q. And when did you last have occasion to look for those files?

A. The last time I looked for them was the morning of the [698] 22nd or the afternoon of the 22nd.

Q. 22nd of June?

A. Yes, shortly after I got the subpoena.

Q. And did you have a discussion with a lady there in charge of the files with reference to the missing file?

A. No, I only asked her where the files on the Panhandle Bar and Cafe were.

Q. I am just inquiring. Did she at that time mention where the files might be?

A. No, she didn't say anything to me.

Q. Did she mention who had been up to see the files?

A. No.

Q. Do you know the lady's name, Doctor?

A. Yes.

Q. May I have her name please?

(Testimony of Charles E. Moon.)

A. It is Mrs. Powell.

Q. But there should have been in those files a complete record of the Panhandle premises, is that not correct?

A. That is right, there should have been a record of all inspections I made.

Q. Now, besides the record of the Panhandle Restaurant would be the record of other matters found such as the condition of the rest rooms?

A. That is right.

Q. And there was something wrong with the condition of the [699] rest rooms, was there not?

A. Yes, when I first made my——

Mr. Cottis: Objected to as immaterial, your Honor.

The Court: Objection is sustained.

Mr. McCutcheon: Very well, sir.

Q. Now, let me ask you another question, Doctor, on that report would be your report of the condition of cuspidors around the card tables, would there not?

A. Well, there would have been report of the—I would have written in and as I remember I did remark about the uncleanness of the cuspidors that were just outside the toilet door.

Q. Now at the time of your final inspection, Doctor—rather, not your final inspection, but at the time you found the spoiled meat and other items that was the worse that you had ever seen the restaurant, wasn't it?

(Testimony of Charles E. Moon.)

A. Yes, that was the worse that I had ever seen the restaurant.

Q. And if that condition had occurred previously you would have closed the restaurant immediately, would you have not?

A. Depending, of course, on the—if I found it, the first time I would have condemned or taken those foodstuffs that weren't fit for eating, I would have taken them and warned the operator and made very frequent inspections following that, possibly every day.

Q. Well, your inspections prior to that time had never been [700] of such a serious nature as to warrant closing the restaurant, had they?

A. No, not to close it, no.

Q. But the condition that you found it finally there was certainly sufficient to warrant closing the restaurant, wasn't it? A. That is right.

Q. And you did order that the restaurant couldn't again open, did you not?

A. Yes, I told them—Mr. Blackard was interested in opening up the restaurant the following Monday under someone else's management and I told them that it would be opened up as soon as it was ready to be opened in a clean condition and not until then.

Mr. McCutcheon: That is all.

(Testimony of Charles E. Moon.)

Redirect Examination

By Mr. Cottis:

Q. Do you recall the date of your visit?

A. No, I don't know what the dates were. Now that was all written down on those inspection forms.

Q. I mean the last one?

A. The last one?

Q. No, I don't—this incident when you found the brains and the liver you said you took them and burned them?

A. Yes. [701]

Q. Had you previously made a visit there and condemned meat and poultry to get rid of it?

A. No, I never condemned any meat previously at the Panhandle.

Q. Well, was there any meat that you condemned but did not take with you that night? Did you just take the brains and the liver or did you load some on a truck?

A. Yes, we loaded all of the foodstuffs that I considered unfit for human consumption onto a pickup truck and took them out to the dump out by Merrill Field and burned them.

Q. I see, you, personally?

A. Yes, I personally did. We took some oil and poured over them out there.

Q. And the United States Marshal didn't come and stop you from doing that?

A. No, I didn't see the Marshal at all, not any time.

(Testimony of Charles E. Moon.)

Q. In the course of your inspection are you concerned with the licenses or permits?

A. The licenses and permits of the City at that time were in a poor state of affairs in that only about one restaurant in nine or ten had a permit to operate. I don't know just who was lax about it but they didn't have the permits. Most of them had permits from the Territory to operate but the City license or permits, as they were called, which was, they had a dollar permit fee. Very few of the restaurants had those permits. [702]

Q. But in your inspection when you were making out a report you would check those too?

A. No, not necessarily, I was concerned primarily with the sanitary condition of the establishments not whether they had permits to operate.

Q. Previous to the time you escorted the meat to the dump pile did you make an inspection and mention that some of the meat should be gotten rid of?

A. No, I had never told them that the meat should be gotten rid of. I had mentioned in several instances that the refrigerator wasn't working as it should be but had never actually told him he should get rid of some of the meat.

Q. That was the refrigerator on the main floor back of the——

A. Yes, that is right.

Q. How many trips did you make—one or two?

A. Where?

Q. At the time you took the meat, had you made a trip there very shortly before that?

(Testimony of Charles E. Moon.)

A. Now, you mean, had I inspected the place?

Q. Yes.

A. I can't just remember how long before it was that I had inspected it, it wasn't much over a week, in fact, I think it was four to five—about six days previous to that.

Q. You hadn't made one in between, say, five days?

A. No, it wasn't that— [703]

Q. Close?

A. —close, it was at least six days, possibly longer. As I say I can't remember. If I had those inspection forms I would have the dates right for you but I don't know what happened to those.

Q. Did you inspect it—

A. At what time?

Q. —just before Mr. Humphries opened it?

A. Yes, he came down and asked me if I would go over and inspect it. He wanted to open it the following day and I went down and looked it over and at that time there were a few things that still needed to be done but he was quite anxious to open and get started so I told him to go ahead as long as he did clean and straighten things up and he was quite lax about doing that after he had been opened.

Q. Were some of those things from the people who had it before?

A. No. No, of course, some of the equipment, of course, was still there and other things that were, part of them no doubt was from the same previous.

(Testimony of Charles E. Moon.)

You see, the toilet facilities and lavatory facilities were particularly something that had to be straightened up.

Q. You no doubt inspected the meat room where the freezer was in the back? A. Yes. [704]

Q. Were the walls covered in any manner besides just finished off?

A. No, they were covered with wood and after Mr. Guard started operating he covered them with aluminum, because I remember it was aluminum that the walls were covered after it had been closed and after Mr. Humphries was through operating.

Q. But before that time during Mr. Humphries' stay in the restaurant they were just wood?

A. I believe they were just wood covered, yes.

Q. What about in the back of the counter on the wall there?

A. In the back of the restaurant counter?

Q. The back of the restaurant counter—the wall?

A. I don't know what type of covering it was but it didn't make too much of an impression in my mind at the time.

Q. Is there any certain covering recommended to make it easier to keep clean?

A. Stainless steel or a metal covering is the easiest to keep clean.

Q. And you can't recall whether that was there or not? A. No, I can't.

The Court: I think that is all, Dr. Moon, you may step down. Another witness may be called.

Mr. Cottis: Mr. Spradlin.

WILLIAM G. SPRADLIN

called as a witness for the defendants, having been duly sworn, [705] testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is William G. Spradlin?

A. Yes.

Q. What is your occupation?

A. Painter.

Q. Were you subpoenaed to come here to testify?

A. Yes, sir.

Q. And by whom?

A. Mr. Humphries or Mr. McCutcheon.

Q. Will you sit nearer to the microphone, please, Mr. Spradlin? Now, on February, 1948, did you have any dealings with Joe Blackard with respect to the Panhandle premises?

A. I did the painting there.

Q. Will you explain what you mean, did you do all the painting?

A. I was the contractor on the job, I was in charge of hiring the men and seeing that it was done right.

Q. You were the contractor for what portion of the work?

A. Just the painting—the painting alone, and papering, of course.

Q. And papering?

A. Yes, sir.

Q. Was it your responsibility to do all the painting and [706] all the papering for the premises?

(Testimony of William G. Spradlin.)

A. That is the way I understood it.

Q. What sort of agreement did you have with Blackard?

A. It was time and material.

Q. And did you do all of the painting and paper hanging?

A. As far as I know I was in charge of it.

Q. Did you have any dealings with Mr. Humphries in connection with that work?

A. Well, yes. Mr. Humphries asked to go to work as a journeyman and I told him it was o.k., and someone hung papers at night when I was gone and we took that up with our union and he was a part owner or lessee or something and he worked or someone did the work, who it was I don't know. They did it nights after I was left. Mr. Humphries came in in the morning and said "Well, I can help you today" and he would get busy doing something else or go away and that was—didn't get no work out of him during the day but someone hung some paper and things during the night.

Q. How much paper was hung at night as nearly as you can recall?

A. The best I could say, there would not be over ten hours—eight or ten hours, what time it would take to do it.

Q. Was the job satisfactory, the work that was done at night?

A. Some of it was and some wasn't.

Q. Can you remember what proportion was and what proportion [707] wasn't?

(Testimony of William G. Spradlin.)

A. Not exactly. I know of three strips we had to cover up and some we had to tear off that didn't stick, but who did it I couldn't swear.

Q. Did you ever see Humphries do any paper hanging around the premises?

A. Not actually myself.

Q. Did you ever see Blackard do any paper hanging around the premises? A. No, sir.

Q. Did you ever see Phillips do any paper hanging?

A. No, sir, I know someone did it though.

Q. Did you put Mr. Humphries on your payroll after he had applied for this job?

A. I did and then he never worked that I saw, so I couldn't keep him on the payroll.

Q. Now, who paid for the materials that went into the job so far as you know?

A. So far as I know Mr. Blackard did.

Q. Did Mr. Starns pay for any of them that you know of?

A. Not that I ever saw or heard of.

Q. Did Mr. Phillips pay for any that you know of? A. Not that I know of.

Q. Did Mr. Humphries pay for any that you know of? A. No, sir. [708]

Q. Did Mr. Campbell pay for any that you know of? A. No, sir.

Q. Have all your bills on that job been paid?

A. Yes, sir.

Q. Who paid them? A. Mr. Blackard.

(Testimony of William G. Spradlin.)

Q. And your job was to do the complete painting and paper hanging of the premises, is that correct? A. Yes, sir.

Q. Now, did you ever sit in on any card games in the Panhandle? A. Yes, sir.

Q. How often? A. Twice.

Q. Can you recall whether or not those games were before April 1st?

A. Well, I wouldn't swear to the date but it was before every place else in town was operating. The games were all over town.

Q. They were all over town? A. Yes, sir.

Q. Did you recall anybody else sitting in either of those games with you?

A. Well, I only know——

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled. [709]

Q. (By Mr. Cottis): I am sorry, I didn't catch your answer?

A. I only know two of the people and I don't know one of their names. One was Mr. Humphries and I don't know who the other——

Q. Was one Mr. Humphries? A. Yes.

Q. Who played in one of these card games with you? A. Yes, sir.

Q. How long did Mr. Humphries play cards?

A. Oh, that I truthfully couldn't say, it wasn't long though, because I went in about approximately eleven and I couldn't say just when he left but it broke up and I went home—we all went home.

Q. Did he play until the end of the game?

(Testimony of William G. Spradlin.)

A. That was the end of the game.

Q. Do you recall seeing Mr. Blackard on the premises at the time?

A. I couldn't truthfully say whether he was there or not.

Q. Did you buy any drinks while you were playing cards? A. Yes, sir.

Q. Did you use chips to pay for beer?

A. They were. Yes, we did.

Q. And you don't remember whether Mr. Blackard was there?

A. No, I truthfully couldn't say. [710]

Q. Do you remember whether Mr. Phillips was there?

A. Yes, he was, he was tending bar.

Q. Did you ever see Mr. Starns on the premises?

A. No, sir.

Q. Did you ever have any dealings with Mr. Starns in connection with the Panhandle?

A. No, sir.

Q. Have you ever had dealings with Mr. Starns in connection with anything else?

A. Yes, sir.

Q. Will you tell us what they were?

A. Well, I have been doing all of his painting since the Panhandle and Fort Starns and the 1042 Club.

Q. But you never had any dealings with him in connection with the Panhandle?

A. None whatsoever.

(Testimony of William G. Spradlin.)

Q. Did you have any conversations that you can recall with Mr. Blackard with respect to the liquor store part of the Panhandle premises?

A. Only to keep it separate, to keep that time separate and materials separate from all other work.

Q. Did you do that? A. Yes, sir.

Q. Do you recall who paid your bill for that portion of the work? [711] A. Yes, sir.

Q. Who? A. Mr. Blackard.

Q. When you played cards in the Panhandle did you observe anything as to whether the games were detrimental or otherwise to the restaurant business?

A. No, sir.

Q. Did they have any effect at all on the restaurant business that you could observe?

A. Well, if anything it would get more people in there, that I could see. I couldn't see any harm in any of it. It seems to me it would help more people to get in the better chance it would be for them to eat there.

Q. How many card tables were there in the premises? A. There were two.

Q. How many of them—how many card games did you ever see going on?

A. Two is the most I know of, that is the ones I played in.

Q. Were there two tables operating simultaneously? A. No, sir, just the one.

Q. Did you ever see more than one table oper-

(Testimony of William G. Spradlin.)

ating as a card table in there? A. No, sir.

Q. Did you ever see either of the tables used for any other purpose? [712]

A. Yes, they ate on them, they served a few meals on them.

Q. As Mr. Humphries' restaurant did?

A. Yes, sir.

Q. When Mr. Humphries applied to you for a job to do paper hanging for you, did you investigate his Union status?

A. Well, as far as the Journeymen I did.

Q. And what did you find out?

A. That he was a co-owner and could work.

Q. If he had not been a co-owner would he have been eligible to work? A. No, sir.

Q. Did you ever actually see Humphries hang any paper at all in there?

A. Truthfully I can't say that I did.

Q. Did you ever see him do any helpful work in the line that you were the contractor for?

A. Yes.

Q. What was that?

A. He got materials for me, helped me get some extra paper and equipment to use, loaned me tools and just helped various ways and even tore paper and done some pasting and he did work. Most of the time it seemed that he would get ready to work, he always had to go somewhere and he couldn't get time to work.

Q. Did Blackard and Phillips give you any help?

(Testimony of William G. Spradlin.)

A. Not the same way, they helped all they could. We were all [713] trying—doing our business to get it finished with the help that we could get.

Q. Did Humphries give you any more help than Blackard and Phillips?

A. No, I wouldn't say he did.

Q. Did you complete the job?

A. Yes, sir.

Q. The paper hanging?

A. I did everything—pardon me—I did everything but the fixtures that went into Mr. Humphries' restaurant. I didn't hang the pie case or a couple of other cases that were in there.

Q. But the paper hanging and the painting except for those fixtures of Humphries were all complete before you quit the job? A. Yes, sir.

Mr. Cottis: Your witness.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. McCutcheon:

Q. You played cards there, did you, Mr. Spradlin? A. Yes, sir.

Q. For money?

A. Well, yes, and drinks.

Q. And, as a matter of fact, one time you won \$40 there, didn't you? [714]

A. I wouldn't exactly say the amount, it was between—it was over \$40.

Q. On June 18th in my office in the presence of

(Testimony of William G. Spradlin.)

Mr. Humphries and Mr. Campbell did you at that time say you won \$40 at that time?

A. I said \$60, if you remember.

Q. Well, I will settle for \$60.

A. I wouldn't positively—I told you the second night I lost.

Q. And the chips were worth money at the bar, were they?

A. No, I didn't trade them in at the bar, I cashed them in at the game.

Q. I say, were the chips worth money at the bar?

A. For beer or drinks.

Q. And did those games go on frequently?

A. I only saw two or three games.

Q. You ate there regularly following the opening of the restaurant, didn't you, Mr. Spradlin?

A. Pardon?

Q. Didn't you eat at the restaurant regularly after it opened?

A. Not regularly but I was in every day or two and have coffee or pie or hamburger or something.

Q. And once in a while play cards?

A. There were only a few games going.

Q. Now, you have done a number of jobs for Mr. Starns since [715] the Panhandle job, haven't you?

A. Yes, sir.

Q. And what jobs have you done for him?

A. Fort Starns and the 1042 Club.

Q. Now, at the time you were in my office on June 18th had you seen Mr. Starns or Mr. Black-

(Testimony of William G. Spradlin.)

ard with reference to this case? A. No, sir.

Q. And I then subpoenaed you to appear here, didn't I? A. Yes, sir.

Q. And since that time you talked with him, have you not? A. Talked with everyone.

Q. And at my office in front of my office, we discussed the case and you advised me at that time, did you, that you could no longer be of assistance in this lawsuit, that now your testimony would hurt Mr. Humphries as well as help him, is that correct?

A. That is true, I can't see where it would hurt anyone.

Redirect Examination

By Mr. Cottis:

Q. Mr. Spradlin, have you ever advised Mr. McCutcheon that your testimony would help Mr. Humphries? A. No, sir.

Q. Did anything that Mr. Blackard or myself ever talk with you about change your testimony in any respect? A. No, sir. [716]

Q. How many times have you talked with me aside from right now in the Court room?

A. One.

Q. When was that?

A. Just before the lunch.

Q. Today? A. Yes, sir.

Q. And you have never talked with me before?

A. No, sir.

Mr. Cottis: No further questions.

(Testimony of William G. Spradlin.)

Recross-Examination

By Mr. McCutcheon:

Q. You talked with Mr. Blackard, did you not?

A. Sure, just like I do Mr. Humphries. I have known both of them ever since I have been in town.

Q. I know but you talked with Mr. Blackard after you talked to Mr. Humphries, didn't you?

A. Sure.

Q. And you also talked to Mr. Starns after you talked to Mr. Humphries, didn't you?

A. Spoke to him.

Juror: Mr. Spradlin, in answer to Mr. Cottis' question "Could Mr. Humphries have painted there if he had not been co-owner or hung paper?" you said "No," why couldn't he have?

The Witness: On Union status. [717]

Juror: Couldn't he have joined the Union?

The Witness: That I don't know.

Juror: Are you an active member is this local?

The Witness: I am for sure of the Master Painters and Journey Men, that according to the Union Business Agent he couldn't have done the job.

The Court: No, you made some statement about your own status of the Union.

Further Redirect Examination

By Mr. Cottis:

Q. You know of no one in the last fifteen

(Testimony of William G. Spradlin.)

months who joined this local who was not a journeyman painter?

A. I am not a judge of who is a journeyman and who isn't. We haven't any examining board.

The Court: Another witness may be called.

Mr. Cottis: Your Honor, may we have a fifteen minute recess at this time?

The Court: Counsel, of course, you may have but these recesses eat up our time and we get nowhere.

Mr. Cottis: I recognize that, your Honor, but, may it please the Court, there is a certain amount of uncertainty about getting witnesses here on schedule because it is difficult to know how long any one witness will be on the stand.

The Court: I suggest you bring them here and keep them for an hour or so. The Jurors are appearing here at great [718] sacrifice. It doesn't matter about the Judge or the Clerk or the Reporter because they are on the payroll anyhow. It is Jurors that are appearing here and I assume they don't like these continued recesses in order to accommodate some witnesses. Now, if parties are bringing lawsuits they ought to get their witnesses here and keep them here.

You may have your recess. Court will stand in recess until 8 minutes past 3.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Cottis: Call Mr. Colip.

OLIN COLIP

called as a witness on behalf of the defendants,
being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Please state your name?

A. My name is Olin Colip.

Q. And what is your occupation, Mr. Colip?

A. I am Chief Special Agent for the Alaska
Railroad.

Q. How long have you been with the Alaska
Railroad?

A. Five years the 24th of last May.

Q. Do you know Vern Humphries?

A. I met him, I think it was in the fall of 1946,
coming [719] up on the train from Seward, if I
remember right.

Q. Mr. Colip, are you familiar with the reputa-
tion Mr. Humphries has for truth and veracity?

A. I think I am.

Q. And will you tell me what that reputation is?

A. I would say it was very poor.

Mr. Cottis: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. That is his general reputation, is it, Mr.
Colip? A. That is right, with the railroad.

(Testimony of Olin Colip.)

Q. What is a person's reputation?

Mr. Cottis: I object, your Honor, the question is too vague.

The Court: Overruled.

The Witness: Well, if a man tells you he will do something and turns around and does something else, I question that as to his reputation.

Q. (By Mr. McCutcheon): That is what happened between you and Mr. Humphries, isn't it?

A. That is right.

Q. By that you determine that his reputation is poor as to truth and veracity, isn't that correct?

A. That is right. [720]

Q. You base that on what has happened between the two of you?

A. In connection with the railroad.

Q. Well, you understand the meaning of the word "reputation" don't you, Mr. Colip?

A. That is right.

Mr. McCutcheon: No further cross-examination.

Redirect Examination

By Mr. Cottis:

Q. Do you know of your own knowledge whether your opinion of Mr. Humphries is shared generally by railroad people?

Mr. McCutcheon: Objected to as an improper question.

The Court: Objection is sustained.

Q. (By Mr. Cottis): You testified that you are

(Testimony of Olin Colip.)

familiar with Mr. Humphries' reputation, did you not? A. Pardon?

Q. Did you not testify that you are familiar with Mr. Humphries' reputation for truth and veracity?

A. That is right, in dealings I had with him in connection with the railroad.

Q. Have you ever discussed his truthfulness with any other people? A. I have, yes, sir.

Q. With many or few? [721]

A. Quite a number of the railroad people—officials.

Q. And based on those discussions what is the general opinion of those people with regard to Mr. Humphries' truth and veracity? A. —

Mr. McCutcheon: Objected to as an improper question.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Is his reputation that you testified to a general reputation among railroad personnel?

Mr. McCutcheon: Objected to as leading.

The Court: Overruled.

Q. (By Mr. Cottis): You may answer that, Mr. Colip.

A. Yes, it is with railroad employees and officials generally.

Q. Did you not testify to Mr. McCutcheon that Humphries had broken his word with you personally?

(Testimony of Olin Colip.)

Mr. McCutcheon: Objected to as leading.

The Court: Overruled, you may answer—Did you or did you not so testify?

The Witness: That is right.

Q. (By Mr. Cottis): You did so testify?

A. With the dealings I had with Mr. Humphries in regard to [722] the way he carried on over at the mess hall.

Mr. McCutcheon: Move to strike the answer on the grounds it is not responsive.

The Court: Overruled.

Q. (By Mr. Cottis): What promises were broken by Mr. Humphries that you can recall?

Mr. McCutcheon: Objected to as leading.

The Court: Objection is sustained upon every other ground too, wholly improper.

Mr. Cottis: Your Honor, Mr. McCutcheon opened the door.

The Court: He did not open it to that extent.

Mr. Cottis: No further questions.

Mr. McCutcheon: No cross-examination.

The Court: You may step down, sir. Another witness may be called.

Mr. Cottis: Call Mrs. Pickens.

THELMA M. PICKENS

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. What is your first name, Mrs. Pickens?

A. Thelma M. Pickens.

Q. Where do you work, Mrs. Pickens? [723]

A. In the Personnel Office of C.A.A.

Q. Do you know Mr. Humphries and Mr. Blackard?

A. I know Mr. Blackard and I know Mr. Humphries by sight.

Q. Do you recall ever eating on the Panhandle premises when Mr. Humphries was operating the restaurant?

A. Well, right after Mr. Blackard took over the Panhandle my husband and I went in there on several occasions eating and we ate there all during the summer regularly nearly every day during the work week and then through the fall up until it burned.

Q. Did you eat there during the spring, too?

A. Yes, I imagine so because it was right after Joe took over the Panhandle there.

Q. Now, when you and your husband were eating there regularly, did you observe any card tables on the premises?

A. Well, I remember that there were tables back there, however, at that time we were eating mostly at the counter and as we became regular customers,

(Testimony of Thelma M. Pickens.)

well, it seemed like we more or less took over the tables back there, and so—I do remember that they had new tables there after a little while—new chrome tables when it was fixed over.

Q. While the card tables were on the premises did you ever see any card games being played?

A. No, I never did, because that was during the lunch hour, I know. [724]

Q. Did you ever see any evidence of friction between Blackard and Humphries?

A. No, I never did.

Q. Did you ever see any evidence of friction between Phillips and Humphries?

A. Never.

Q. Do you know Mr. Starns?

A. No, I don't.

Mr. Cottis: Your witness.

Cross-Examination

By Mr. McCutcheon:

Q. Were the chrome tables there when Mr. Humphries had the restaurant or was that after Mr. Guard took the restaurant over?

A. Mr. who?

Q. Mr. Guard—Jack Guard?

A. I tell you, at the time that we were eating there when we first started eating in there I didn't pay much attention to who had the cafe over there, but after awhile after we had been eating there so long you come to know the people and I remember Mr. and Mrs. Cavins—Dorothy and Carl.

(Testimony of Thelma M. Pickens.)

Q. Who?

A. I believe Cavins—Dorthy and Carl is what I knew them as, so I just can't recall when the tables went in or anything like that, who had it at the time.

Mr. McCutcheon: No further questions. [725]

Redirect Examination

By Mr. Cottis:

Q. Do you actually know that you were eating there while Humphries ran the restaurant?

A. I am sure I was. Well, the first time I remember ever eating in there was at the time, I believe, Mr. Humphries had cut his finger—hurt his finger—and that is how come me to just know Mr. Humphries then because we were sitting at the counter having lunch and I think my husband asked him how he hurt his finger and how he was doing. That is just an impression that was left on me at that time.

Q. And you ate regularly from that time on?

A. Yes, I would say that we did. I know that we, all through the summer and the fall that we were there.

Mr. Cottis: No further questions.

Mr. McCutcheon: No further questions.

The Court: Witness is excused.

Mr. Cottis: I will ask Vern Humphries to take the stand.

The Court: Mr. Humphries may resume the witness stand.

VERN HUMPHRIES

called as a witness on behalf of the defendants, having previously been sworn resumed the stand and testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Vern Humphries and you have already been [726] sworn in this matter, is that correct? A. Yes, I have.

Q. Now, Mr. Humphries, will you tell me as nearly as you can remember who your creditors were on April 1st, 1948?

A. Well, is there any particular one you want to know? I think I got credit from about everyone I went around and asked. I could borrow a dollar. I don't quite get what you mean.

Q. Mr. Humphries, you have no records available for that period of time, is that not correct?

A. Records for what?

Q. Of your liabilities and your assets?

A. Well, if you name any particular one I probably could take and tell you.

Q. Did you owe Anchorage Dairy any sum of money at that time? A. —

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I have done—Anchorage Dairy, I don't know that name—Anchorage Dairy?

Q. (By Mr. Cottis): Did you owe Matanuska

(Testimony of Vern Humphries.)

Valley Cooperating Association any money at that time? A. At what time?

Q. April 1st, 1948?

A. Around April 1st I paid him but later I owed him a bill [727] of \$100 or some dollars, I don't know how much.

Q. Did you owe North Pole Bakery any money on April 1st?

Mr. McCutcheon: Objected to as incompetent, immaterial and irrelevant.

The Court: Overruled, you may answer.

The Witness: Yes, I believe I owed them something around that time.

Q. (By Mr. Cottis): Do you recall how much?

A. No, I don't.

Q. Do you still owe it to them?

A. North Pole Bakery?

Q. Yes.

A. I think there was a lawsuit when I wasn't present that they had taken a default judgment last summer. I haven't went into the matter though, I wouldn't say.

Q. You haven't looked into the matter of whether they took judgment against you?

A. I am sure there was judgment taken because I wasn't here. I was back east and I don't know when the trial came up.

Q. Did you owe a man named Moreland any money on April 1st, 1948? A. No.

Q. Do you owe Moreland any money today?

(Testimony of Vern Humphries.)

A. No.

Q. Does Moreland have a judgment against you for some money? [728]

A. Moreland is paid off.

Q. That is, the judgment was satisfied?

A. Yes.

Q. And about when did that occur?

A. I couldn't tell you the exact date on it.

Q. Was your indebtedness to Moreland incurred prior to April 1st, 1948?

Mr. McCutcheon: Objected to as immaterial.

The Court: I don't see the point of all this, counselor?

Mr. Cottis: Just this, your Honor, part of this lawsuit and part of the allegations of the complaint is that the defendants have injured Mr. Humphries' credit rating by their activities along in May, 1948. I am endeavoring to show that his credit was not very good prior to that date.

The Court: All right.

Mr. McCutcheon: If the Court please, I understand now that Mr. Cottis will be bound by the witness' answers?

The Court: No, no party is bound by the answer of any witness. The old rule that party is bound by the answer of a witness who is sworn at his instance no longer holds.

Mr. McCutcheon: Very well, sir.

The Court: You may answer, if you know. You may answer to the extent of your knowledge.

(Testimony of Vern Humphries.)

The Witness: I know up until April I paid my bills—current bills that was coming in—after that it was made so [729] impossible I had to buy more groceries and more meat for the operation. Yes, I owe some money here in town but until I can get some of my money out of the equipment that Joe Blackard deliberately stole away from me or taken away from me I haven't had a chance to take it back. Now, that is the whole truth and nothing but the truth.

Q. Now, did you owe Moreland some money before April 1st? A. I don't recall.

Q. Did Moreland sue you claiming that *he owed you* money?

A. I think the Court records will speak. I forgot what it is all about.

Q. Do you recall any suit by Moreland against you? A. The Court records will show it.

Q. Do you recall any such suit?

A. I still remind—the Court will show records of it.

Mr. Cottis: Your Honor, I ask that the witness answer the question.

Mr. McCutcheon: I think he has a good point.

The Court: Answer the question to the best of your knowledge.

The Witness: I think there is a court record out here that will show all the evidence in it but all the details of it I don't remember, that is by-goes in my mind.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Did you not go through two trials on the Moreland matter? [730]

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: Yes, it might have been two.

Q. (By Mr. Cottis): Now, do you recall whether your indebtedness to Moreland was incurred before April 1st, 1948?

A. You would have to look at the Court records for the date, I don't remember.

Q. Wasn't Moreland an employee of yours at the railroad and isn't that the indebtedness stemmed from?

A. I don't know what went on at the railroad at that time.

Q. Do you remember when you paid Moreland off?

A. I don't remember what just the coincident, the Court record will show it and I don't remember.

Q. Now do you recall whether before April 1st, 1948, you owed Herberts, Incorporated, a bill of \$162.16?

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I don't know.

Q. (By Mr. Cottis): You don't remember just off-hand?

A. Just off-hand what is the name again?

Q. Herberts, Incorporated.

A. I can't recall it unless I could see the bill, I don't know what they do. [731]

(Testimony of Vern Humphries.)

Q. Do you know whether you owe a firm by that name any money today?

A. Right off-hand I don't recall the name.

Q. Now, did you owe Bliss Construction Company any money prior to April 1st, 1948?

A. Bliss Construction Company to this day has never asked me for a nickel.

Q. They have never sent you any bill?

A. No, sir.

Q. Did you ever have a discussion with Mr. Bliss and Mr. Schroeder about a bill?

A. I told them to take it to Mr. Blackard one time when they came down to see me and which I understood they did.

Q. You never acknowledged that you were indebted to them? A. No, I never did.

Q. Have you even been convicted of any felonies, Mr. Humphries?

Mr. McCutcheon: I object as improper, he called the witness, and at this time the question is highly improper.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Mr. Humphries, did you ever give Mr. Graves a check for the restaurant equipment?

A. Not a full check, no, there could have been a \$500 check, but I doubt it. I think I drew it out personally myself from [732] the bank.

Q. Did you not testify the other day that you never gave Mr. Graves any check?

(Testimony of Vern Humphries.)

A. I said to the best of my knowledge.

Q. Has your recollection changed now?

A. No, it hasn't, not unless I would see a check, and I did why I would admit to it but I don't recall. I believe I went to the bank direct myself and drew the money out.

Q. What was the total purchase price that you paid Mr. Graves?

A. I paid Mr. Graves \$2500.

Q. Now, can you recall any other creditors of yours who existed prior to April 1st, 1948?

A. Yes, I can recall about three suits which I haven't had a chance at two of them yet of paying that you sued me three times to date, yourself.

Q. I am referring to a time prior to April 1st, 1948?

A. There could have been a little current bills that weren't pushing at that time but at that time I paid all \$2500's worth of bills that were right then due and owing.

Q. And you can—and can you remember now whether Moreland had been paid off at that time?

A. I still maintain to look at the Court records and what happened to Moreland is right there in proof and that is the best that I can answer. Come to think of it, I believe Joe [733] Blackard agreed to take my icebox for the bill.

Q. What box was that?

A. That was the icebox in the Panhandle after I left here. Now it comes to my memory, out here

(Testimony of Vern Humphries.)

in the hall day before yesterday Moreland's attorney said he had reached agreement with Mr. Blackard at one time.

Q. Who is Moreland's attorney?

A. I believe it is Mr. McCarrey.

Q. Do you know what the agreement was?

A. No, I don't, it was barely spoken at a five-minute recess and I didn't take it in.

Q. Do you know whether that attachment—that cebox had been attached by Mr. McCarrey?

A. I told him at one time to attach it.

Q. Now, as of March 25, 1948, did you owe Pierce Manufacturing Company a bill?

A. Will you repeat that again, please?

Q. As of March 25th, 1948, did you owe Pierce Specialty Manufacturing Company a bill?

A. Yes, and I paid it, which I have a check to show.

Q. That is all paid in full now?

A. As far as my knowledge. My bill was paid by check which I have the check here to prove.

Q. You have the cancelled check here in Court?

A. I have the cancelled check. [734]

Q. Would it take you long to find the check, Mr. Humphries?

A. I don't know.

Q. Did you not owe prior to April 1st the Alaska Neon Engineering Company \$808.61?

A. Will you speak that again, please? I never owed a Neon Sign in this town in my life. That is Mr. Blackard's bill.

(Testimony of Vern Humphries.)

Mr. Cottis: Will you mark this for identification?

Q. Mr. Humphries, I hand you what has been marked Defendants' Exhibit G and ask you what it is, if you know?

A. No, that was the one you gave me the other day, I don't.

Q. And I show you that portion of Exhibit G which has the words "Vernon Humphries" written; I ask you whether that is your handwriting or not?

A. No, it is not.

Q. It is not your handwriting?

A. It is not my handwriting.

Q. Do you know Mr. Havins' handwriting?

A. No, just right off-hand I don't unless I seen him sign a paper.

Q. Did you ever see him sign this paper that you can recall?

A. No, sir, I never did see the papers that Mr. Havins signed with Mr. Blackard but I understood that he signed some kind of a paper I.O.U. \$450 or something of that sort and I was not present and that paper was never signed by me and how my name has got wrote on there—you must remember I am left-handed [735] and this is a right-handed paper.

Q. And you definitely will say you never signed that paper?

A. I will definitely say I never signed that paper.

(Testimony of Vern Humphries.)

The Court: How is that paper marked?

The Witness: It is Defendants' Exhibit F, your Honor.

Q. (By Mr. Cottis): Better still, Mr. Humphries, you said you had at least one of your cancelled checks in the Court room? A. Uh huh.

Q. Can you produce that?

A. Yes, I believe my attorney can, I can't. I can't because I don't have it.

Mr. Cottis: Your Honor, I request that it be submitted for handwriting.

The Court: If it is available counsel or the plaintiff may produce it.

Mr. McCutcheon: Well, what is counsel's purpose?

Mr. Cottis: For handwriting comparison.

Mr. McCutcheon: Well, there are forty signatures. For the purpose of making the comparison of the handwriting only, only, however.

Mr. Cottis: Yes. Do you have any objections to their being offered in evidence for that purpose only?

Mr. McCutcheon: May I see the checks again?

Mr. Cottis: Yes. [736]

Q. Mr. Humphries, while Mr. McCutcheon—Do you mind if I ask him some questions while you are looking at those?

Mr. McCutcheon: No.

Mr. Cottis: While Mr. McCutcheon is looking at those, will you list for me again the equipment

(Testimony of Vern Humphries.)

that you purchased in Seattle that was used in the Panhandle?

The Court: That has been gone over so often I don't see any purpose in having the witness repeat it.

Mr. Cottis: Very well, Your Honor.

Q. Mr. Humphries, you heard Mr. Campbell's testimony the other day, did you not, with respect to the repayment of that \$450 to Joe Blackard?

A. Yes.

Q. And was that testimony correct so far as your recollection goes? A. Yes, it was.

Q. Who was it who handed the \$450 to Mr. Blackard?

A. That was one of my employees.

Q. And what was his name?

A. Oh, I don't know whether I can recall his name right now or not without getting in some of the records, I had so many employees there that I forget just which one, but I believe that his first name was Dol or Del or some such name, I really can't recall right now. I know the kid when I see him. [737]

Q. Do you know where he is right now?

A. Not for sure, I seen him on the streets here a couple of weeks ago but I don't even know where he lives. I probably could run into him in the next three or four weeks, if you would wish for me to do so.

Q. Is this ex-employee of yours a relative of Mr. Campbell's, that you know of?

(Testimony of Vern Humphries.)

Mr. McCutcheon: Objected to as immaterial.

The Court: Overruled.

The Witness: I don't know whether he is or not.

Q. (By Mr. Cottis): Does Marvin Campbell have a cousin named Del?

A. He has one named Delmer, but I don't believe it is Delmer. I don't believe he ever worked for me. I borrowed the money from Delmer but I am confident it wasn't Delmer because I have another kid in mind.

Q. Was it the entire \$450 paid to Blackard at that time? A. Yes, sir.

Q. And was it all in cash?

A. It was all in cash.

Q. Do you remember the denominations of the bills?

A. No, I don't take that time, I have never looked at any bill in my life and I have handled thousands of them.

Q. Where did you get the money—from your cash register? A. No, I didn't. [738]

Q. Where did you get it?

A. Joe came over somewhere around 11:30 and he says "Vern, I have just got to have some money because I am so short" and I say "O.K., I will get it for you." I have already spoken to Mr. Campbell and Mr. Ingram, so they both were around there. Mr. Campbell was there for his mother—the remodeling and so forth—and he was help-

(Testimony of Vern Humphries.)

ing both Joe and I and I had asked him to borrow \$300 from him and \$200 and some dollars from Del Ingram, and they both went to the bank. Del Ingram went to the First National Bank and drew money out that day and Marvin Campbell went to the Bank of Alaska and drew money out that day, and they both brought it to me. It wasn't over five minutes apart.

I think Delmer came back before Marvin did and when I had the money in my hands I give it to this person and says "Give it to Joe over there" and I hollered at Joe "Here is your money" and he says "Thanks" or something like that back at me, and that was the end of it.

Q. Delmer came in first with the money that he had borrowed? A. Yes.

Q. And then Marvin came in within five minutes or so?

A. They both came in practically the same time; it wasn't more than two or three minutes apart one way or the other.

Q. And you simply held Delmer's money until Marvin came in?

A. I didn't go back to the bank with it. [739]

Q. Did you put it in your cash register?

A. No.

Q. Did you put it in your pocket?

A. That could have been the only logical place I could have put it.

Q. Did you put it in your pocket intact?

(Testimony of Vern Humphries.)

A. Yes, I put it all in my pocket.

Q. And then when Marvin gave you the money he had borrowed did you put that in your pocket?

A. I counted out the rest of the amount right out on the counter. I counted out the \$300 to make it. It was \$300 correct, and I took the money from my pocket and finished up the amount and handed this to the person standing there beside me and said "Give this to Joe" and hollered at Joe.

Q. Where was Marvin Campbell?

A. Marvin Campbell was right in front of the counter.

Q. Were you in front of your counter or behind? A. I was right behind.

Q. Marvin and you both were behind the counter?

A. We was all inside of 31 feet behind the counter working.

Mr. McCutcheon: If the Court please, may I be heard on an objection to the present line of cross-examination. Counsel once had an opportunity to cross-examine this witness and did so on the very subject and went over the ground in detail.

The Court: Objection is sustained. [740]

Mr. Cottis: May it please the Court, no evidence that this method of payment came out until Mr. Campbell's testimony.

The Court: Objection is sustained.

Mr. Cottis: Very well, Your Honor. Does coun-

(Testimony of Vern Humphries.)

sel have any objection to introducing those checks in evidence for handwriting purposes only?

Mr. McCutcheon: Did counsel intend to introduce the document that is purported to be signed by Mr. Humphries?

Mr. Cottis: Yes, if I can authenticate it.

Mr. McCutcheon: Under those circumstances I suppose I shall be permitted to see it?

Mr. Cottis: Yes. Would you mark this for identification?

Mr. McCutcheon: May I inquire?

The Court: Yes.

Mr. McCutcheon: Whose handwriting appears at the top? Do you recognize Joe Blackard's handwriting when you see it?

The Witness: Yes, I do.

Mr. McCutcheon: Is that Joe Blackard's handwriting?

(No response.)

Mr. McCutcheon: Is it signed by Joe Blackard?

The Witness: Yes, yes, that is Joe Blackard's handwriting—no, I don't believe this here is the same as his name. It looks like Joe's handwriting. I don't believe so.

Mr. McCutcheon: Is it signed by Joe Blackard?

The Witness: It is signed Kenneth Havins, Joe Blackard, [741] Vern Humphries.

The Court: Court will stand in recess until 4:00 o'clock.

(Short recess.)

(Testimony of Vern Humphries.)

The Court: The record without objection will show all members of the Jury present. Counsel may proceed with the examination.

Mr. McCutcheon: I show you again Defendant's Exhibit F, Mr. Humphries——

The Court: That is not in evidence yet, Mr. McCutcheon.

Mr. McCutcheon: For identification, sir.

The Court: Very well.

Mr. McCutcheon: And ask you if you signed that piece of paper?

The Witness: I signed a similar one but not this one.

Mr. McCutcheon: That is not your signature?

The Witness: I signed the one I signed in pencil.

Mr. McCutcheon: Was it similar to this one?

The Witness: Yes, it were.

Mr. McCutcheon: Same provision in it as far as you know?

The Witness: As far as I know it is, but we didn't use a pen, we didn't have a pen that day and we all used a pencil.

The Court: What are we waiting for now, to determine whether certain checks will be produced?

Mr. Cottis: Yes, Your Honor.

Mr. McCutcheon: I have offered a number of checks with [742] Mr. Humphries' signature. Counsel can take it from there.

Mr. Cottis: You have no objection to the introduction of these particular checks?

Mr. McCutcheon: No.

(Testimony of Vern Humphries.)

Mr. Cottis: Do you have any objection to the introduction of this?

Mr. McCutcheon: Yes.

The Court: I understand the checks are offered only for comparison of handwriting, is that correct?

Mr. Cottis: Yes, Your Honor.

The Court: They may be admitted in evidence for that purpose and the Jury are instructed that they will not consider these checks for any other purpose than the handwriting on the checks. Is it admitted that the defendant—or that that the Plaintiff, Humphries, signed the checks, is that admitted?

Mr. McCutcheon: Yes, Your Honor, that is admitted. However, we object to the introduction of the document.

The Court: Let's get the checks over first. What will be the number?

The Clerk: Defendant's Exhibit I.

Mr. McCutcheon: I have no objection Your Honor, to the checks being admitted for general purpose and inspection by the Jury other than handwriting.

The Court: Does counsel wish to put them in for general purposes? [743]

Mr. Cottis: Yes, if Mr. McCutcheon will produce the remainder of them for general purposes.

Mr. McCutcheon: If counsel agree that they all can go in for general purposes I will offer them all.

Mr. Cottis: Certainly.

The Court: Add the rest of them to them. And I

(Testimony of Vern Humphries.)

take it that counsel will waive the reading of all these checks and that they may go to the Jury?

Mr. McCutcheon: Yes, indeed, sir.

Mr. Cottis: I should like to offer this in evidence, does counsel have objection?

Mr. McCutcheon: Well, I just thought perhaps I would give him all the checks here before I see it.

The Court: Haven't we enough checks, what is the purpose of putting in any more?

Mr. McCutcheon: I guess we have. Is counsel making this offer without any proof as to its authenticity?

Mr. Cottis: Yes, unless you object to it.

Mr. McCutcheon: Well, I would like to hear it authenticated; I will object unless it is.

Mr. Cottis: I will offer it in evidence anyhow on the basis of testimony this morning. It is notarized.

The Court: This is an assignment signed by Harold L. Bliss and acknowledged before a notary public and it may be admitted in connection with the testimony of Mr. Bliss. What [744] is that?

The Clerk: It is Defendants' H for identification earlier and it is Defendants' H now.

Mr. Cottis: May I read it to the Jury at this time?

Mr. McCutcheon: I will stipulate that it may go to the Jury without reading, counsel.

Mr. Cottis: I should like to read it.

(Testimony of Vern Humphries.)

“Assignment

“Know all men by these presents: That Harold L. Bliss, doing business as Bliss Construction Company, Anchorage, Alaska, does by these presents assign, set over and transfer unto Joe Blackard, of the same place that certain claim for Three Thousand Five Dollars and Eighty-Nine Cents (\$3,005.89) which the assignor hereof holds against one Vernon Humphries, also of Anchorage, Alaska, and which claim arises out of work performed and materials furnished at the instance and request of the said Vernon Humphries at premises known as The Panhandle Cafe, 314 Fourth Ave., Anchorage, Alaska, the said work having been commenced during February of 1948 and completed on or about 3 March, 1948.

“The consideration for this assignment shall be the execution of a Promissory Note in the sum of Three Thousand Five Dollars and Eighty-Nine Cents (\$3,005.89) payable by Blackard to the assignor, or his order.

“The assignor represents and covenants that the above [745] claim is equitable and just; that Humphries has no set-offs or counter-claims to apply against said claim; that the amount of said claim as herein set forth includes the sums due or heretofore paid to all sub-contractors, laborers and suppliers arising out of the work performed by the assignor.

(Testimony of Vern Humphries.)

“In witness whereof, the assignor has hereunto set his hand and seal this 4th day of May, 1948.

“/s/ HAROLD L. BLISS,

“dba Bliss Construction
Company

“Executed in the presence of:

“RALPH H. COTTIS,

“MARY KILROY.”

and the usual acknowledgement on it by the notary public.

Q. Mr. Humphries, in prior testimony you volunteered that Mr. Blackard had stolen some equipment from you, on what do you base that statement?

A. Well, he broke the locks off the doors that I had locked up and taken possession.

Q. Was this at the Panhandle?

A. It was at the Panhandle.

Q. And about what date, do you remember?

A. It was in the latter part of May.

Q. And what doors?

A. I closed up the 21st of May and he proceeded in there shortly afterwards. [746]

Q. Did you see him break the locks?

A. He admitted before the United States Marshal and myself that he did.

Q. And what locks were they?

A. They was locks to my reach-in icebox in the

(Testimony of Vern Humphries.)

back room and also the padlock on the door that led into that.

Q. And what equipment was inside your reach-in icebox?

A. There was no equipment inside the reach-in icebox.

Q. What contents did that reach-in icebox have prior to the time its locks was broken?

A. Will you speak that again? I didn't get more than one word.

Q. What were the contents of that reach-in icebox before the locks was broken, what was it?

A. It was meats inside of there.

Q. What equipment was in the room that was locked?

A. Oh, there was a meat slicer in there, there was a meat grinder, an electric saw, cube steak machine, french-fry cutter and various groceries.

Q. And the locks were broken sometime after the 21st of May, is that your testimony?

A. Yes.

Q. And before what date? When did you discover it?

A. Oh, it was about the latter part of the month, I believe. I believe it was somewhere around the 27th in there, I don't [747] know how many days before that it had been broken but I walked in there around about that time and I seen the locks broken and I went up and got the United States Marshal, Mr. Hoff, and brought him down there and Mr.

(Testimony of Vern Humphries.)

Hoff asked who taken the locks off and Joe said "I broke them out."

Q. Joe said himself?

A. Yes, yes, said himself, he had broken them off.

Q. What equipment, if any was missing?

A. I didn't inventory. I was only there just a few minutes.

Q. Had anything else of yours on the premises been broken into?

A. I was only there a few minutes and seen that those locks had been tampered with and the meat at that time then was on the truck out on the back backed up to the back door. And Mr. Hoff, the Marshal, and myself, ordered it to be taken back in. Later on Mr. Blackard had it condemned or something and we—and it was still hauled away in the same truck.

Q. What equipment did you ever find to be missing, if any?

A. I never taken no inventory after I left there, I don't know. It seemed to be pretty much burnt up when I came back and you couldn't very well tell then under snow and so forth what was in there and what wasn't. I know this stove was there and the counter and a few things like that under the rubbish, but as far as knowing what was in there I don't know from the day I put the padlocks on the doors, because the next [748] days I left for the States.

(Testimony of Vern Humphries.)

Q. Did you ever demand either personally or in writing that Blackard deliver that equipment anywhere?

A. I asked him to buy it or to let me sell it.

Q. When was that?

A. Oh, that was somewhere around the early part of May, I couldn't swear now just what the date was on it.

Q. Before the 21st of May? A. Yes.

Q. Now, when you closed the restaurant on the 21st of May, what kind of lock did you put on that storeroom?

A. It was just a common, ordinary lock.

Q. Was it a padlock or a bolt?

A. It was a padlock.

Q. Was it a lock that you, yourself, had purchased? A. Yes, I had.

Q. Were you back on the premises after that date?

Mr. McCutcheon: I would like to renew my objection, Your Honor, as to the line of questioning, at this time, that counsel once had opportunity to cross-examine on the same subject and did so.

The Court: Since that time the witness without any question having been asked has told about some property which he says was stolen from him by Joe Blackard. I think in view of that statement counsel has the right to examine as to the [749] property which the witness says was stolen. Objection is overruled.

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Was it a padlock that you, yourself, had purchased somewhere, Mr. Humphries? A. Yes.

Q. After you closed the restaurant on the 21st of May, when did you next return to the premises?

A. I believe it was somewhere around the latter part of May. It was about the 27th, I believe, I could be off one day or two days but it was right in there.

Q. As nearly as you can recall then that was the first time that you had been back on the premises?

A. Yes, and then I was just into the back door and seen the meat and I went up then—the Marshal, and I left immediately and I came back down I guess some few hours afterwards and the padlocks was still off of the door. I walked into the store-room and the meat was thrown around there and I picked most of it up and put it back in the ice-box and I left right on out. I was only there a few minutes.

The Court: I think counsel should confine his questions to the matters brought up by the witness' answer. You have been all over this ground before concerning which the witness was just testifying, in fact, three times.

Mr. Cottis: I was not intending to get into the meat [750] situation, Your Honor. Do I understand that I am in the same position as continuing a cross-examination?

The Court: No, you called this witness, theo-

(Testimony of Vern Humphries.)

retically you could put on only testimony which was not brought out and could not rightly have been brought out by cross-examination. You are using the witness as your own witness.

Mr. Cottis: Yes, Your Honor.

The Court: And you should be governed accordingly.

Q. (By Mr. Cottis): Now, Mr. Humphries, what was the conversation between you and Blackard earlier in May when you state that you asked him for permission to sell the equipment?

A. Will you speak that again, I didn't quite get it?

Q. What was the conversation between you and Blackard earlier in May when you testified you asked him if you could sell that equipment?

A. I had a buyer for the place and Blackard didn't agree to it and I asked Mr. Blackard if he would reimburse me and he said he didn't see any grounds of doing so and that was the extent of it.

Q. You asked him if he would reimburse you for what?

Mr. McCutcheon: I renew the objections on the grounds previously stated, Your Honor.

The Court: Overruled. Answer the question.

The Witness: On the contract we signed upon Joe terminating me from the premises that he would take and purchase my stuff, so I asked him if he wanted to buy it?

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): This was after he had refused to consent to the sale?

A. Yes, it was practically all done.

Q. And was that the proposed sale to Mr. Garvin? A. Yes.

Q. Well, now, Mr. Humphries, you don't know then whether Joe ever misappropriated or stole that equipment or not, is that correct?

Mr. McCutcheon: Objected to on the grounds that he has answered the question.

The Court: Overruled.

The Witness: What I meant by the word "stolen" he had taken possession, went ahead and used it and used the groceries that I had on hand into the place and destroyed by the fire and somehow I don't have no equipment left. I don't know what you would call it but he used it for seven months thereafter.

Q. (By Mr. Cottis): Now, what leads you to believe that he used the inventory of supplies that you left there?

Mr. McCutcheon: Objected to as improper.

The Court: Overruled.

The Witness: Well, I have not been able to find any other [752] reason why because he taken the locks off of the doors. I did see him hauling stuff away from the place and when the place burnt down and according to the other people that was into it after Jack Guard was there, Mr. Guard said there was stuff of mine there—groceries——

(Testimony of Vern Humphries.)

Q. (By Mr. Cottis): Never mind what other people told you.

A. Mrs. Cavins said—testified that there wasn't any. I don't know because I wasn't here.

Q. Who testified that there wasn't any?

A. Mrs. Cavin who operated the place after Mr. Guard.

Q. Is that the only basis for your belief that Joe stole something from you?

Mr. McCutcheon: Objected to on the grounds the question has been completely covered.

The Court: Overruled.

Mr. McCutcheon: If the Court please, despite the Court's ruling, I would like to renew my objection again. It seems to me that counsel has wide latitude and has two cracks at cross-examination of the witness and seems to be covering ground that to me he had an ample opportunity to cover in cross-examination before. It seems unfair. May I renew my objection?

The Court: Objection is overruled for the present.

The Witness: Well, he certainly taken over the equipment and used it. That is the only theory I have. [753]

Q. (By Mr. Cottis): Well, Mr. Humphries, did you make any demand on Joe after May 27th to return the equipment to you?

Mr. McCutcheon: Objected to on previous grounds, Your Honor, he had an opportunity to cover that point on cross-examination.

(Testimony of Vern Humphries.)

The Court: Objection is overruled. You may answer.

The Witness: Will you read the last question.

(Question read.)

The Witness: No, I never talked to Joe after that personally. I locked the place up depending on this trial here which I thought would come up with inside of two or three weeks, and I never dreamed at the time that it would take fifteen or sixteen months before I got a hearing on it. That was the theory I closed it.

Q. (By Mr. Cottis): And two fires in between, I suppose?

A. I wasn't here at the time of the fires so I couldn't say, Cottis.

Mr. Cottis: No further questions.

The Court: That is all, you may step down.

Mr. Cottis: Your Honor, Mr. McCutcheon is entitled to cross-examination if he wants to.

Mr. McCutcheon: No cross-examination.

The Court: An emergency matter is coming before the [754] Court at 4:30 and it is now 4:00. If you have a witness whose testimony can be quickly taken you may call him, otherwise we will suspend this trial and take up something else.

Mr. Cottis: Your Honor, I do, but it involves another situation and I will have to ask Your Honor's consent. It is one of the girls who works in our office, Mrs. Thompson, now she was in here

a few days ago in this Court room before I knew I would want her for a witness. I want her as a witness with respect to where she copied plaintiff's Exhibit 3 from.

The Court: I am afraid you will have to dispense with her testimony, counselor, because she, as you say, is one of your own people and she should have been warned. In Dr. Moon's case he is a professional man and ordinarily outside of the rules of professional people who testify to technical things, I, too, strictly held to the absence or exclusion of witnesses.

Mr. Cottis: Yes, Your Honor, in that event I have no short witnesses available.

The Court: Very well. Ladies and Gentlemen of the Jury, another matter comes up which the parties think that action should be taken immediately and it seems so to me—application for receivership. I feel that it ought to be heard promptly and this trial will therefore be continued until next Tuesday morning at 10 o'clock and, in the meanwhile, you will be careful not to discuss the case among yourselves or with others and not to listen to any conversations about it and not [755] to form or express an opinion until it is finally submitted to you.

Please report on next Tuesday morning at 10 o'clock. You may now retire.

(Whereupon, at 4:05, p.m., Wednesday, June 29, 1949, the trial was continued in recess until 10:00 a.m., Tuesday, July 5, 1949.) [756]

Tuesday, July 5, 1949.

The Court: Clerk may call the roll of the jury in this case.

(Names of Jurors were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the defendant.

Mr. Cottis: I will call Joe Blackard.

JOE BLACKARD

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct-Examination

By Mr. Cottis:

Q. You are Joe Blackard?

A. That is right.

Q. Is that your full name?

A. Joe DeWitt Blackard.

Q. And you are one of the defendants in this action?

A. That is right.

Q. Joe, when did you come to Alaska?

A. 1944.

Q. And what did you do after you got here?

A. Well, I worked for the Army for a year and one half to two years and then I came in and run the Firestone Service Center down here for a year or a year and one-half, and then I went [759] in business of my own at the Panhandle up until the

(Testimony of Joe Blackard.)

place burnt down, and then I had the Super Service Station out at 15th and East G.

Q. What was your arrangement about taking over the Panhandle business?

A. Well, I bought that along in January of 1948 and it was the Panhandle Bar and Cafe.

Q. What was the arrangement between you and Larry Starns, if any?

A. Larry loaned me \$10,000 and taken a chattel mortgage on any equipment or stock that I should have there and he was to take and put in a liquor store in one corner of the building and was to pay me \$175 a month for that liquor store for having it in there, which it did, and that was to go against my \$10,000 that he had borrowed from me.

The Court: I missed some of that, Mr. Blackard, I wonder if you can speak louder. You said something about \$10,000 and I didn't understand it: It is necessary for me to give instructions upon the law to the jury and therefore it is necessary that I hear the testimony. Will you repeat your answer once more.

The Witness: Mr. Starns loaned me \$10,000 when I went in there. It cost me close to \$23,000 to start with and I paid \$2,000 for the signing of the lease and \$20,000 for the lease and the equipment that was to go with it. [760]

Q. (By Mr. Cottis): Who did you buy the business from?

A. Mrs. Campbell—Bibbitt and Hardy.

(Testimony of Joe Blackard.)

Q. Were they operating it before you moved in there?

A. Yes, sir, Mr. Tibbitt and Mr. Hardy was operating it when I moved in there. We had a Clyde Graves who was running the restaurant at that time. Clyde Graves was running the restaurant and Mr. Tibbitt and Mr. Hardy had the bar and one time previous, a short while before, they had a cab stand in there which they also operated and they had a liquor store which they operated.

Q. Had you had experience in operating bars?

A. No, I hadn't.

Q. How did you happen to go into that business?

A. I thought I would try to go in business of my own myself there and Mr. Hardy traded with me down at the Service Center and he and Mr. Tibbitt were wanting to get out and Mr. Tibbitt was getting old and they started talking to me and I wound up behind the place.

Q. What was the purchase price?

A. Paid Mr. Tibbitt and Mr. Hardy \$20,000 plus about \$900 approximately for the liquor license—Territorial Liquor License; paid Mrs. Campbell \$2,000 for the signing of the lease then. They had a provision in the lease that they couldn't assign it without her consent. [761]

Q. Then all together you paid \$22,900, is that correct?

A. Approximately, yes.

Q. And did that include any stock?

A. No, there was no stock there—there was a

(Testimony of Joe Blackard.)

little bit left, left just a few bottles of stuff on the back bar and all the Cokes and soft drinks, they let that go with it.

Q. Just what did the \$22,900 include?

A. Well, there was a restaurant there we had a bill of sale for. Mr. Hardy gave us a bill of sale for the equipment that was in the restaurant and he also gave us bill of sale for some of the stuff that was on the bar. There was some that wasn't movable at the time the lease would be up and it was just for fixtures and good will.

Q. When that lease was assigned to you—The assignment, I believe, is in evidence. I notice that it was assigned by Tibbitt to you and to Larry Starns, why was that?

A. Well, in order for Larry to put a liquor store in there and by the provisions of the leasing, well, he couldn't put a liquor store in without getting hold of Mrs. Campbell and getting her o.k. and I needed some money and he said that he would loan me \$10,000 with two years to pay and \$4,000 the first year and \$6,000 the second year and we would let the \$175 that he was to pay against, on the liquor store, let that apply to the debt that I owed him and I could pay him out by the month until I had him paid off at 8 per cent interest. [762]

Q. Well, were you and Starns partners?

A. No.

Q. Did you have any interest in the liquor store?

A. None whatsoever.

(Testimony of Joe Blackard.)

Q. Was the liquor store connected in any way with the Panhandle premises physically? I mean were there any doors or anything like that?

A. No, there was a door led to the liquor store from the outside and one led into the Panhandle from the street.

Q. Did Starns have any interest in the Panhandle Bar or restaurant business?

A. No, only interest he would have had would have been in case I defaulted on my lease he had a note saying that I had to pay him \$4,000 by the first of the year, '48 and \$6,000 by the first of the year of '50.

Q. Was that the total of your obligations as to Starns?

A. That is right, I bought a little stock from him that we used and had to pay back, too.

Q. I am sorry, I couldn't hear that.

A. I had bought some beer and stuff on the original investment. He bought Mr. Hardy's and Mr. Tibbitt's stock from them and then he left some of it there and I used some, which was also charged against me.

Q. After you bought the Panhandle business from Tibbitt and Hardy who was operating the restaurant, if anyone? [763]

A. Clyde Graves.

Q. Where is he now?

A. He is in Seattle.

Q. What happened between you and Graves, why didn't he continue operating?

(Testimony of Joe Blackard.)

A. Well, he said that I wanted \$200 a month for the restaurant and wanted him to move it and he said that he couldn't see it.

Q. So then what happened with respect to the restaurant?

A. Well, I said I was going to remodel and I told him the day I wanted to start remodeling and he said he would be out by that day—what stuff he had he would have out—of his stock and he would replace some old stuff that was in there and he said that he would have his stuff and he would move out.

Q. And was he? A. That is right.

Q. Then what happened?

A. Well, Mr. Humphries came along about that time and said he was a restaurant man and he had been operating down at the railroad and he was a cook and he was interested in running a restaurant. At that time I told him that I didn't want to run a restaurant and I didn't know how to run a restaurant, I wasn't a cook, and I was looking for someone to run a restaurant for me.

Q. Where did Havins come into the picture?

A. Kenny? He had just been let off the Police Force and I don't know—I didn't know him at that time. Mr. Humphries brings him in and said that he wanted Havins as a partner, something like that.

Q. Was that agreeable to you? A. Yes.

Q. Then what happened?

(Testimony of Joe Blackard.)

A. Well, they came in and we started to remodeling and we were down for about a month—well, Mr. Humphries did. He went ahead. We had an agreement drawn up that he was to move the restaurant back, stand the expenses of moving it back, and Mr. Starns was to put the liquor store where the restaurant had originally come from and he was just to move the restaurant back about 18—approximately 18 to 20-foot back.

Q. Was there any agreement between Humphries and Starns that you were aware of?

A. None whatsoever.

Q. Was there any conversation or agreement between you and Humphries about the length of the counter?

A. Well, there was. We were talking about how far back we should move it and I don't remember how it came up, anyway it got in the agreement—said approximately 18-foot. It was to vary a little either way according to the agreement.

Q. What was the agreement, if any, about operating hours for the restaurant? [765]

A. Well, there was no agreement in particular, Mr. Humphries and I talked about it one time and I was kind of interested and maybe the restaurant would stay open 24 hours if it would pay because it would mean more to me, the more it stayed open and the more he taken in the bigger my percentage would be and we talked about leaving it open 24 hours and I said I would be for it and

(Testimony of Joe Blackard.)

he said he would like to leave it open, too, if it would pay his help.

Q. What was the arrangement, if any, about payment for moving the counter and remodeling the restaurant and equipment?

(No response.)

Q. Were you to pay for it or Humphries or who?

A. Mr. Humphries, that was the agreement that he would stand the expense of moving the restaurant back and then he could operate it for me there.

Q. And did he stand the expense of moving it back? A. No, not that I know of.

Q. What happened in that regard?

A. Well, Mr. Bliss came along and did most of the work, he and Anchorage Installation which was working under Mr. Bliss,—the plumbers were—and they do the work and then they didn't get paid and they came up shortly after we were open and Mr. Bliss told me he was intending to close me down if something wasn't did.

Q. So what was done? [766]

A. I came up to you and asked if he could close me down on someone else's bill and he said on someone's bills on a labor bill there he could; he could close the place down until someone paid it. And then in about ten days—in a few days I went down to see Mr. Bliss and I asked him to come up

(Testimony of Joe Blackard.)

to your office and we would talk it over and see what kind of agreement we could draw up and we drew up an agreement that I would pay the \$3,000 off and pay it at \$500 a month if I could, which I couldn't, but I paid \$250 a month, approximately.

Q. And that was Humphries' obligation, was it? A. That is right.

Q. Well, now did you have any other discussions with creditors of Humphries?

A. Well, yes, along about that time this Pierce Upholstery they put some leatherette on the front of the counter and Mr. Humphries was to pay for that. I think maybe he did pay a few dollars on that, I don't know how much it came to. I know Mr. Pierce filed a lien against the Panhandle Bar—Panhandle Cafe over in one of the law offices here that was left him owing sixty-five or seventy-five, and they talked to you about it and you called me and we had to pay that one off for Mr. Humphries and also Mr. Barrett came up—that was later on—he didn't come up, he sent Harry Andrews down from Grocery Supply and Harry told me they were going to close me down unless I paid the \$3,000. At that time they first came to see me it was [767] something like \$1700 or \$2,000 and I told him I wouldn't pay it. He said "Someone is going to have to pay for it" and I said "I wouldn't." I told him if he didn't get paid I wouldn't deliver any more, that I wasn't going to pay it. You said about on groceries and consumable supplies that you didn't think that I would have to pay it.

(Testimony of Joe Blackard.)

Q. Was the restaurant operating all during this time? A. Yes.

Q. How many hours per day, if you can remember?

A. Well, I don't exactly. I think that it operated 24 hours a day part of the time and I think there was a little while that it was operated just—I wouldn't be sure of that—I think maybe he closed at night for a few hours there for a while.

Q. What about the card playing? Was there card playing on the premises?

A. Yes, we had just a few days of card playing there in one month.

Q. When was that, do you recall?

A. I would say it was the last of March and the first of April, approximately.

Q. Did Humphries object to the card game?

A. None whatsoever, he played in the games quite considerable. I don't play cards, but I did see Mr. Humphries played in the games quite a bit. He wasn't cooking, he had lost his finger [768] and he was in there quite a bit in the afternoon and evenings and we had about the ten days we had card games there and Mr. Humphries played quite a bit.

Q. How many tables of card games?

A. There was two and there was two tables back there and we had one game going, which was the most they ever had because it was early in the spring and there was just no one playing, there was no money at that time.

(Testimony of Joe Blackard.)

Q. Did you just state that the most you ever had was one game going?

A. To the best of my knowledge it was. We had two tables but it was kind of close back there for them to get around and there wasn't many people in and one game was all we ever had.

Q. What kind of game, do you know?

A. I think they had knock poker, maybe.

Q. Did you receive some sort of profit from the card table operation?

A. I did not.

Q. Did you receive nothing at all?

A. No, there was—there was—there just wasn't any money made.

Q. What did Starns have to do, if anything, with the card games?

A. Nothing at all that I knew anything about.

Q. Now, Joe, I show you what has been marked for identification [769] as Defendant's Exhibit F and ask you what it is?

A. Well, that is a little note that was drawn up at the time we opened up. Mr. Humphries bought some of Mr. Graves' stuff. There had been new stools put in there and Mr. Graves had put those in. He had taken the old ones out and he hadn't thrown them away, they were downstairs, they weren't near, and he said "I will take my new stools out and put in the old ones." And there was a restaurant operating before he went in there and there was enough stuff to continue to operate the restaurant, but the stuff he had was a great im-

(Testimony of Joe Blackard.)

provement for the restaurant. So Mr. Humphries was to buy that stuff.

Started out Mr. Graves asked \$500 for that—\$2500, and he came down and I think that he finally sold his stuff for \$2250 and Mr. Humphries didn't have enough money to buy this stuff and he borrows \$450 from me, and this is the note he borrowed from me there in the Panhandle while the place was torn down.

Q. Did you see Mr. Humphries sign the note?

A. That is right.

Q. Which hand did he sign it with?

A. I wouldn't say, I don't remember which hand he signed. I think he can sign with either hand, so I wouldn't say which hand this was with.

Q. Who was present at the time he signed it?

A. Clyde Graves, Universal Food, was present and Kenny Havins [770] that was a partner he had at that time, and he was present, and I don't quite recollect this other. I think a fellow that worked for Graves at the time was on this other signature here as a witness.

Q. Was that \$450 ever repaid to you?

A. It was not.

Q. Was any part of it ever repaid to you?

A. None whatsoever.

Q. Did you ever receive a bill for paper hanging from Humphries? A. I did not.

Q. What were your arrangements about paper hanging in the Panhandle?

(Testimony of Joe Blackard.)

A. Mr. Spradlin did paper hanging for me, and all the painting for the inside of the building and the outside. He stained the back bar. We had the back bar remodeled and we put stain on it and varnish. And he did that and he had about, oh, approximately five men working for him. Mr. Humphries had asked to work for him, so Mr. Spradlin says that Mr. Humphries asked to work for him, I don't know, he was supposed to have worked a little bit.

Q. How much of the paper hanging and painting work was Mr. Spradlin supposed to do for you?

A. He was to do it all.

Q. What sort of payment arrangements did you have with Spradlin? [771]

A. Well, I was just to pay him. He was a contractor. He had about five—approximately five men—four or five—and himself that worked there and he also had a job out at the Fort going on at that time and he would switch men when he would get a slack spot out at the Fort he would bring them into town and work there in the Panhandle and he gave me a bill which I paid, and we have the bills that we paid—I think in the neighborhood of \$500—that we paid for the labor that was done inside there, Mr. Spradlin gave us the bill for.

Q. Did you ever authorize any one else to do the paper hanging in there?

A. Well, at nights there we did a little bit ourselves when we would close up the front door. We

(Testimony of Joe Blackard.)

didn't do paper hanging, we would close up the front door and it was all boarded in and we would work there a little at nights trying to help out a little bit.

Q. Who worked there at nights to help out a little bit?

A. Glen Phillips worked there with us a little, Harold Brand and myself, and I wouldn't say, Mr. Humphries says he did, I don't remember whether he did or not.

Q. Are you absolutely certain that \$450 was never paid? A. I am positive it wasn't.

Q. Did you hear Mr. Humphries testify that he paid it? A. That is right. [772]

Q. Did you hear Mr. Campbell testify that he saw somebody pay it to you?

A. That is right.

Q. But you are still certain that it was not paid? A. It was not paid.

Mr. Cottis: I offer this in evidence.

The Court: Is there objection?

Mr. McCutcheon: Yes, we object, your Honor, on the grounds that it hasn't been properly authenticated, that there is a dispute as to whether or not it was the original statement.

The Court: Objection is overruled and it may be admitted and may be read to the jury and marked Defendant's Exhibit F.

Mr. Cottis: It is on a printed form entitled at the head: "Statement." It is dated Anchorage, Alaska, February 5, 1948.

(Testimony of Joe Blackard.)

“I, Joe Blackard, loan the amount of Four hundred fifty dollars to Kenneth Havins & Vern Humphries, known as The Alaska Food Supply. This money is to be paid back the 2-15-48 or the equipment purchased from Clyde Graves, that is now in the place of business known as the Panhandle Cafe be turned over to me, Joe Blackard, without any lien or trouble of any kind on that date.”

and it is purportedly signed by Joe Blackard, Kenneth Havins, Vernon Humphries, and witnessed by C. L. Graves and some other signature which I can't read. [773]

Q. Joe, how did Kenneth Havins happen to leave the business, if you know?

A. Well, I don't think he and Mr. Humphries got along any too good, I don't know.

The Court: What was the answer?

Q. (By Mr. Cottis): Did you ever make any objection——

(Answer read.)

Q. (By Mr. Cottis): Did you ever object to Mr. Havins operating the restaurant?

A. None whatsoever.

Q. Now, who operated the restaurant after Havins?

A. Well, as far as I knew Mr. Humphries was to operate the restaurant.

Q. Did you ever consent to the partnership of a man by the—a man named Jones with Mr. Humphries? A. No.

(Testimony of Joe Blackard.)

Q. Was there ever a man named Jones that you know of in there operating the restaurant?

A. I think there is a fellow by the name of Jones worked a few days for Humphries.

Q. Do you know what arrangement existed between Humphries and Jones? A. No. [774]

Q. Did you ever consent to Mr. Campbell's going into partnership with Humphries on that restaurant operation?

A. I didn't know he was in partnership with him until they filed suit against me as partners.

Q. Did you know who Campbell was?

A. Yes, I knew him.

Q. Had he been around the premises?

A. Yes, when we were remodeling. One day I was intending to put a cab stand in the back end of the Panhandle and I was going to move it to the side of where the old stand had been at originally and had a carpenter there putting the cab stand in, was going to put a small counter in low to take in calls on cabs, and Mr. Campbell goes up and sees his lawyer. He was in the place, walks out of the place and goes up to see Mr. McCarrey and sends Mr. McCarrey down that time—was he and his mother's wish that I wouldn't put a cab stand back in there because they didn't think it was a legitimate business; they didn't want me to have because maybe I would be subleasing. Mr. McCarrey came down and said that they wished that I wouldn't. They had a fellow by the name of C. W. Major,

(Testimony of Joe Blackard.)

and he stored the partitions and we left it vacant when we put in an air line office at the same place.

Q. Did you ever observe Mr. Campbell working for Mr. Humphries or working with Mr. Humphries?

A. Not until after we opened up, then I think Mr. Campbell [775] the first few days after the Panhandle was open after remodeling Mr. Campbell went to washing dishes; they had bought a dishwasher and it had hardly served the purpose, it was too small, but, anyway, they had Mr. Campbell as a dish washer.

Q. How was the restaurant operation?

A. Well, it wasn't any too awfully good, as I would see it, it had run down pretty fast.

Q. In what way?

A. Well, sanitary way and just several different ways—the help wasn't paid and they were late being paid and they didn't get along too well, they had an awful turnover of help and the Union was in there about half the time with their help and it was just kinda a mess.

Q. Did you ever tell Humphries that he did not have to furnish the \$3,000 bond indemnifying you against liability to his creditors?

A. I did not.

Q. Did you ever hear any conversation between Humphries and anybody regarding that bond?

A. No, I didn't.

Q. Did he ever furnish the bond?

(Testimony of Joe Blackard.)

A. I never did see one.

Q. Did he ever pay you the \$200 per month or the 6 per cent of gross? A. No, sir. [776]

Q. Now, what were the arrangements between you and Mr. Humphries as to payment for electricity and fuel and that sort of thing?

A. Well, I was to heat the building, furnish the overhead lights that was sufficient for the building, and Mr. Humphries that he needed a small light in front of each customer and he wasn't hardly satisfied with the lights or he wanted to put an extra icebox in. He was to take care of his own lights. There was a meter put up for the restaurant and there was also six or eight hundred-gallon oil tank out back to take care of the oil range that the restaurant used and it was separate and the meters were separate from the one on the main part of the building and the oil tank was separate.

Q. Well, all the contractors—both versions, as shown in Plaintiff's Exhibits 1, 2 and 3 provide that: "That Blackard is to furnish the light, heat and water * * *." What about water; did you furnish that?

A. No, I don't think that I did. I have an idea that Mr. Humphries' water was billed to him right along with his electricity bill, I wouldn't say, I don't know. The only thing, I did have the 'phone and I know they billed that to me and I think they billed him for the water. They billed me for my water.

(Testimony of Joe Blackard.)

Q. Do you know whether they billed him for water or not? A. No. [777]

Q. Did Mr. Humphries ask you to reimburse you for water? A. No.

Q. How many meters were there on the premises? A. Three.

Q. What were they for?

A. One was for Larry Starns' liquor store and the other was for my bar and I had two or three ice-ing machines. I had one ice-maker and had two cold boxes—cool boxes—one was—both had electric motors and the other was for the restaurant that ran two or three iceboxes. The stove ran off electricity—the motor on the stove. Mr. Humphries had added three or four lights over the tops of his counter low, I would say four or five foot over the top of his counter, and if I am not mistaken City Electric or Anchorage Electric put those in for him.

Q. What, if any, was Glen Phillips' position at the time?

A. Well, when we first opened up Glen worked as a bartender for a couple of weeks, maybe a month and he came in as a partner in the Pan-handle.

Q. Do you remember when that was?

A. No, I don't.

Q. I show you Plaintiff's Exhibit 14, is that a good reproduction of the restaurant?

A. That is pretty good.

The Court: Will counsel hold it so that the jury can see it? [778]

(Testimony of Joe Blackard.)

Mr. Cottis: I am not going into much detail, Your Honor.

The Court: Let the witness hold it up so the jury can see and they will be better informed.

Q. (By Mr. Cottis): What is this wall back here?

A. That is the back of the liquor store, back wall.

Q. And who are these people here?

A. The first three are Mr. Humphries' little kids.

Q. How did they happen to be in there, if you know?

A. We had kind of planned this picture ever since we opened up and they had come down to get their picture taken in the place. And that is Mrs. Humphries in the back there.

Q. When were the pictures taken, do you recall?

A. No, I don't, shortly after we opened up.

Q. Were arrangements made in advance for them?

A. Well, I don't know, I think Mr. Campbell made the arrangements to take the pictures to send to his mother. At that time he thought the place looked awfully nice and thought his mother would like to see a picture of the place and I think he made it. We all knew at the Panhandle—we all knew that they were going to have the pictures taken there a couple days.

Q. How long had it been——

(Testimony of Joe Blackard.)

A. I would say a day or two days ahead of time.

Q. You stated, did you not, that the restaurant was not being operated to your satisfaction?

A. That is right. [779]

Q. What, if anything, did you do about it?

A. Well, after about three months with no rent or two months with no rent or anything at all, I talked to you about it and we give a notice then that they would have to vacate the place on several reasons—Mr. Moon didn't like the way it was operated, and the debts were piling up pretty fast, fellows were coming in telling me they were going to close me down if I didn't do something about it, and about that time I had to make Mr. Bliss' \$3,000 bill good, had to sign for it anyway, and Mr. Barrett was bothering me, Mr. Pierce was after me and at that time there was several others that were coming in wanting to know about it and I hadn't had any satisfaction from the restaurant at all and we give the man notice to move from the place.

Q. Did he move from the place?

A. No, sir, he went ahead and operated on three or four more weeks.

Q. Did you do anything to interfere with his operation?

A. Well, not until after that we had given the notice for the man to move.

(Testimony of Joe Blackard.)

Q. Now, in the complaint it states that on May 5th you locked the storeroom, did you?

A. I don't know about the date exactly but we did lock the storeroom, not particularly his storeroom but the storeroom to where we had a few cases of beer and some liquor there. We [780] locked that storeroom. And I didn't go into Mr. Humphries' backroom there where the icebox was at in the back room and he could still get into the basement, which he continued to do to get into the basement.

Q. Who continued to get into the basement?

A. I don't know who did, they had a few supplies down there that they went ahead and used. They had some potatoes and some stuff and when the cooks would come to us and ask us when Glen and I either one were on the place we would open the door and let them down the store—went through the storeroom with them because there was a little stuff that we had missed there in the storeroom, too, so we would go right in there with them and wait until they came out and lock the door back up again, although not all the time, I would say. I don't remember of anyone ever asking the key that we didn't have it, but I know there was a few times we wouldn't have the key. I went through what is known as the coal chute. It is a drop in the floor there. You step down three feet and you take another three-foot stepdown. They inventoried the place when there was no key on the place and that was after the restaurant closed and that was

(Testimony of Joe Blackard.)

the way we got into the storeroom—Mr. Guard and the fellow from Alaskan Merchandisers went in that way because the key wasn't there.

Q. How long was that after the restaurant had closed, do you recall? [781]

A. The best I remember the restaurant closed on Thursday night or Thursday afternoon and I don't know the date and then on Saturday we got an inventory taken on the place and Mr. Castlio he looks it over and there was a little fish and a little stuff in there. It wasn't hardly what he thought. He said he couldn't inventory because as far as he was concerned it was no good, and I was going to throw it out and the Marshal comes up and he tells me I can't throw it out and we call Mr. Moon up and he comes in and looks at it and he throws it out himself and taken it away—the meat and the other stuff that was left in there—with the exception of the flour and the sugar and the other things that Mr. Moon had taken with him.

Q. Do you recall what the total value of the inventory made by Alaskan Merchandisers was?

A. No, I didn't—I saw the inventory but at that time Alaskan Merchandisers they had only inventoried the stuff that they owned themselves there—stuff that they had sold—and there wasn't an awful lot of their stuff there. And Jack, the best I remember his name, he says that most of the stuff belonged to Grocery Supply or Food Center and that he would have to have them price it out

(Testimony of Joe Blackard.)

because their prices would vary a little bit on each thing, and he priced his and the best of my knowledge he gave Grocery Supply the bill to price out. And he said at that time that it was approximately four to five hundred dollars. [782]

Q. Where is the inventory now, do you know?

A. I think Grocery Supply has it.

Q. Have you tried to locate it?

A. I have, Jack said that he couldn't, that he had gave it to Grocery Supply and that he had talked to Harry Andrews from Grocery Supply.

Mr. McCutcheon: Objected to as hearsay.

Q. (By Mr. Cottis): Yes, just stick to things within your own knowledge, Joe.

A. I had talked to Harry and he said that he——

Mr. McCutcheon: Objected to as hearsay.

The Court: Objection is sustained.

Q. (By Mr. Cottis): Now, Joe, what arrangements did you make with Dorothy Cavins regarding the restaurant?

A. Well, before Dorothy came in we had had another person running the restaurant and when Dorothy came in we told her that we hadn't made any money from Jack Guard, that he hadn't cost us anything though and he hadn't paid us just any rent at all or anything for the use of the restaurant in there and he had paid his own lights and everything but he couldn't make any money, the place was run down and there was very few peo-

(Testimony of Joe Blackard.)

ple came in to eat at the restaurant, so Jack didn't make any money. Mrs. Cavins was running the Black & White at that time, or what is known as Wilson's now. She was a manager—she was a [783] manager for Wilson. She had quite a few people who liked her. She was a good worker and she wanted a restaurant of her own and she came and talked to me about the restaurant and I told her that we would talk to Jack and if he wasn't too undesirable about getting out of the place, that didn't disagree too much that we would let her come in, and Jack said his trade wouldn't mind him getting out, that he hadn't made any money and he said he couldn't make any money, in fact, it cost him to begin to operate and he was going to make some changes but he would just as soon turn it back, so he gets out and Mrs. Cavins comes in and she says that she would pay 10 per cent. She and her husband was going to work it. And she said if they had to work both shifts themselves that they would and they would make some money one way or the other, and that is the way they came in. They worked real hard and they brought a lot of their trade over from Mr. Wilson's Cafe and a lot of people who knew the two of them and had come over and they paid us 10 per cent. We paid everything and they just came in and cooked there, and if they taken in a dollar we got a dime of it.

Q. What do you mean when you said that you paid everything?

(Testimony of Joe Blackard.)

A. Well, at 10 per cent that way, well, she—we paid the lights, we paid the water, and all that she did was cook.

Q. Who paid the fuel oil? A. We did.

Q. Who paid the electricity for refrigeration and dishwashers [784] and that sort of thing?

A. I did, I did.

Q. And what was that percentage that you were getting? A. 10 per cent.

Q. What had the percentage been with Humphries? A. 6 per cent.

Q. Did Humphries ever make available to you his books showing what his gross receipts had been?

A. None whatsoever.

Q. What had been the arrangements with Graves concerning payment for fuel, heat, water and that sort of thing? A. He had always paid it.

Q. What percentage did Graves pay?

A. He paid \$150 a month, just a flat rent.

Q. Who, if you know, supervised the Bliss Construction work for Humphries, did you or Starns or Phillips or Humphries?

A. Well, no, Mr. Humphries did it himself. He had the carpenters to work for him and one night he kept the plumbers working for him, which was cost me a lot of money in the long run, about \$40 an hour for an all-night session.

Q. How do you mean it cost you a lot of money in the long run?

A. I had to pay Mr. Bliss back for that work Mr. Humphries had done and didn't pay.

(Testimony of Joe Blackard.)

Q. Did you have anything to say about the construction of [785] the restaurant counter?

A. Well, the only thing we had to say was I told him where he could move it approximately and that was where it was to sit.

Q. What about the design of the counter?

A. I didn't have anything to say at all about any of that. Mr. Bliss turned the carpenter over to him or the foreman did and let Mr. Humphries tell the carpenter whatever he wanted did and that was what the carpenter was to do. I also had a couple of carpenters that was turned over to me to do the work that I wanted to do.

Q. When did the restaurant open, if you remember?

A. I don't exactly remember, don't remember the date. We opened along the first of February—fourth—or fourth or sixth or eight, something like that, anyway the bar opened on Saturday. The restaurant had a lot of trouble, he didn't get open officially and doing business to amount to anything until the following Monday or Tuesday.

Q. When did Larry Starns' liquor store open, if you know?

A. Well, Larry had his own carpenters and they finished up a little bit ahead of us and he had his store stocked and everything and he opened on Saturday morning that I opened at noon on Saturday morning.

Q. When was it that Humphries opened the restaurant?

(Testimony of Joe Blackard.)

A. He was three or four days later before he got where he [786] could prepare a meal in the restaurant.

Q. Did Humphries pay you any money at all when he opened? A. None whatsoever.

Q. Did he lend—did any money exchange hands between Humphries or Humphries' employees or friends? A. It didn't.

Q. Did you tell Humphries that you needed money at that time to get open? A. I didn't.

Q. Did Humphries ever ask that you pay a water bill? A. No.

Q. Did you ever prevent fuel oil from being delivered to Humphries or Campbell?

A. No, sir.

Q. Do you recall when it was that you had this notice served on Humphries?

A. No, I don't.

Q. Do you recall how long it was after the service of that notice that Humphries and Campbell finally left the restaurant premises?

A. Oh, close on to a month.

The Court: Court will stand in recess until five minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all [787] members of the jury present.

Mr. Cottis: Your Honor will recall that when Harold Bliss was testifying he was directed to have

his bookkeeper produce some original copies of documents today and she is here and I wonder if there would be any objection to placing her on the stand before taking further Mr. Blackard's testimony.

The Court: She may take the witness stand.

FRANCES CLAY

called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Frances Clay?

A. It is.

Q. And you have charge of the records of Bliss Construction Company, do you? A. I do.

Q. Have you with you the company's copies of the bills regarding Bliss' work at the Panhandle premises? A. Yes, I do.

Q. Are they all the copies of what appear in your records? A. Yes.

Q. May I see them? A. Yes. [788]

Q. What is the significance of the three groups?

A. These were divided into three separate accounts—one for the cafe, one for the front, and one for the bar.

Mr. Cottis: May I have these marked for identification? Unless counsel has objection I would like to have them marked as a group, three groups altogether.

The Clerk: Defendants' J, K and L.

(Testimony of Frances Clay.)

The Court: What is the general name of these papers, Miss Clay, are they bills or invoices?

A. These are the original invoices.

The Court: Invoices.

Q. (By Mr. Cottis): Mrs. Clay, I show you the group of items which have been marked Defendants' J and ask you what these are?

A. These are the invoices for work done in the Panhandle Cafe.

Mr. Cottis: I offer these in evidence.

Mr. McCutcheon: Were you the bookkeeper in March, April and May, 1948?

The Witness: Yes, I was.

The Court: What was your answer that you were the bookkeeper at that time?

The Witness: Yes.

The Court: Did you make out the invoices embraced in Defendants' J for identification. [789]

The Witness: I perhaps ought to correct that, I—well, I wasn't exactly the bookkeeper, I was bookkeeper helper in training. There were two bookkeepers at that time but the writing is mine.

The Court: The writing is yours?

The Witness: Yes.

Q. (By Mr. Cottis): Mary Moore was the other lady there, is that correct? A. Yes.

Q. And she is no longer in the Territory, is that right? A. No, that is right.

Mr. McCutcheon: Did you intend to offer them all?

(Testimony of Frances Clay.)

Mr. Cottis: Yes.

The Court: Is there objection?

Mr. Cottis: I am only offering that one now.

Mr. McCutcheon: No objection.

The Court: Without objection the exhibit consisting of several sheets may be admitted as Defendants' Exhibit J, and they may be read to the jury.

Mr. McCutcheon: I will stipulate that the reading may be waived and read later.

Mr. Cottis: Very well, we so stipulate, your Honor.

The Court: Very well, it is understood then that the reading of this particular exhibit at this time is waived. [790] Either of counsel may read portions later or during arguments if they so desire.

Q. (By Mr. Cottis): Now, Mrs. Clay, I hand you what has been marked Defendants' K for identification and ask you to describe what that is?

A. These are invoices for the Panhandle Bar.

Q. And they are the original documents from your files, are they?

A. Yes, they are.

Mr. McCutcheon: No objection.

The Court: Without objection the papers marked for identification as Defendants' Exhibit K may be admitted and may be read to the jury.

Mr. McCutcheon: I will stipulate that the reading be waived.

Mr. Cottis: So stipulate.

The Court: By stipulation of counsel reading at this time is waived. Portions or all of the documents may be read later.

(Testimony of Frances Clay.)

Q. (By Mr. Cottis): Mrs. Clay, I hand you now what has been marked Defendants' Exhibit L for identification and ask you what that is?

A. These are the original invoices for the Pan-handle front.

Q. That is, the exterior of the premises in front?

A. That is correct.

Mr. McCutcheon: No objection.

The Court: Without objection the papers marked for identification as Defendants' Exhibit L may be admitted and may be read to the jury. On stipulation of counsel they may be read later.

Mr. McCutcheon: I will stipulate.

Q. (By Mr. Cottis): Mrs. Clay, I invite your attention to the last two items of Defendants' Exhibit L which bear printed numbers 6302 and 6374 and dates March 23, 1948, and March 8, 1948, and particularly I invite your attention to the words "Blackwell and Starns" on the first of those and "Blackard and Starns" on the second of those, can you explain to the Court, if you know, the reason for that change in the billing at that time?

A. We did not know at the first of this work that Mr. Blackard wanted his bills separated this way so that he would know how he would pay for them or put them in his books.

Q. Did you ever have any conversation with Starns about the matter, that you recall?

A. No, I did not.

(Testimony of Frances Clay.)

Q. Then is it your testimony that Blackard requests that the bills be made out that way?

A. Yes.

Mr. Cottis: Your witness. [792]

Mr. McCutcheon: No cross-examination.

The Court: That is all unless the jurors wish to inquire.

(No response.)

JOE BLACKARD

previously called as a witness in behalf of the defendants, having previously been sworn, testified as follows:

Further Direct Examination

By Mr. Cottis:

Q. Mr. Blackard, what is your explanation, if any, for the fact that on two of several invoices in Defendants' Exhibit L the words "Blackard and Starns" appear?

A. Well, on the front that we remodeled—the front of the building—we tore the old pair—there was no door on Larry's liquor, there was two doors on my side, one went into the old cab stand which was used as the office at that time and one went into the remaining part of the building. So Larry had to put in another door on his side and the whole thing needed working over—the whole front. It looked bad and we decided that Larry would put in for his side—he would pay for his side, and I would

(Testimony of Joe Blackard.)

go 50-50 on building the new front. There was very little talk did about it. We knew it needed a new door and a new front and Larry said "We will just put in a new one."

Q. What were your instructions, if any, to Bliss Construction about the matter?

A. I told—I went over to Mr. Bliss' office when I got my [793] bills and told them that I would pay the bill, which I did—pay for the front and my bar—and that for them to mark which was the front and which was the bar because the bar was all mine. The front half of the front was to be remodeled with Larry so that he could have a fairly nice looking front for his liquor store.

Mr. Cottis: Your witness.

The Court: Counsel for Plaintiffs may examine.

Cross-Examination

By Mr. McCutcheon:

Q. Was there gambling on the premises during the time the restaurant was there, Mr. Blackard?

A. We had a car—running card tables.

Q. Was there gambling at those card tables?

A. I think there possibly was, yes.

Q. Well, do you know or don't you?

A. Well, they played cards and as far as gambling I couldn't say what they were doing. They said they were playing knock poker and pan.

Q. Were they playing for money?

A. I imagine they were.

(Testimony of Joe Blackard.)

Q. Do you know?

A. Off-handed I wouldn't because I didn't play in them.

Q. Did you receive any profits from the game?

A. I did not. [794]

Q. You say you don't know how to play cards?

A. That is right.

Q. Did you ever at any time see cards played there for money?

A. ———

Mr. Cottis: Your Honor, the witness has answered that question three times.

The Court: Overruled.

The Witness: Now, just how did you mean that? I told you that I don't play cards. I didn't play in the games because I can't and I didn't receive any profit from them and I have an idea that they did play for money. I heard Mr. Spradlin say that he won some and lost some. I also heard Mr. Humphries say that Mr. Humphries was sitting in the game there with him, so I would say that they did play for money.

Q. (By Mr. McCutcheon): You would say that they did? A. Yes.

Q. Do you base that statement on the testimony of Mr. Spradlin, is that correct?

A. Not particularly, the whole thing so far as me knowing they played for money, I don't but that is usually the procedure for tables, though.

Q. The chips were good at the bar for a drink, weren't they?

(Testimony of Joe Blackard.)

A. That is right, and they would come back and pick them up after the game. [795]

Q. Who would?

A. The boys from the tables, first there would be one fellow and then another. I never taken any. I wasn't tending bar but I knew they did get them because once in a while when I checked the tills out there would be chips laying on the tills. They weren't rung up at all until——

Q. Who got the chip back?

A. The boys at the card tables.

Q. Who were the boys at the card tables?

A. Various fellows who came in and wanted to play cards.

Q. You mean that one of the players would get up from the tables and take one of his chips over to your bar and you would serve him a drink of whiskey?

A. I wouldn't say he was a player.

Q. Who, if he wasn't the player?

A. The fellow who brought the chip to the bar.

Q. What connection did that fellow have with the house?

A. I wouldn't say he had anything to do. There would be a dealer there and there would be boys sitting there at the table.

Q. What was the relationship between you and the dealer?

A. He was to operate the games and pay me anything if he made any money he was to pay me money.

(Testimony of Joe Blackard.)

Q. Did you ever make any money?

A. That of know of, no. If they did I didn't get any. [796]

Q. How many days? A. 10 days.

Q. Did you inquire every day? A. I did.

Q. What kind of maneuver went on that there was no money made? A. The dealer had shills.

Q. What is a shill?

A. That is another fellow who sits in the game to help make it look like a going game there.

Q. And are you sure you don't know how to play cards? A. That is right.

Q. All right, go ahead. A. You go ahead.

Q. How many shills sit in the game?

A. I would say three, something like that.

Q. Now on May 10, 1948, in the Commissioner's Court in this court house, in the presence of the United States Commissioner, Rose Walsh, twelve jurors and other persons being present, did you not swear to God that no gambling was ever conducted in that premises?

A. I said I never received any money for gambling in that.

Q. Did you not swear to God that you did not permit any gambling on the premises?

A. I would not say I did. [797]

Q. Is that your signature at the bottom of that affidavit? A. That is right.

Q. Will you check that affidavit over and see if you want to change your answer?

(Testimony of Joe Blackard.)

A. No, I won't change it.

Q. Did you not on the 17th day of May, 1948, before Ralph Cottis, a notary public, swear as follows: "No gambling is permitted by me on the premises"?

A. But as far as I know that is right.

Q. Well, you didn't permit any gambling on the premises, is that your testimony?

A. Oh, had a card room there.

Q. Who ran the card game for you?

A. There was a fellow by the name of Preston.

Q. Fellow by the name of what?

A. Preston.

Q. What kind of deal did you have with him?

A. Recreation card room and at the time that we started there if there would have been any money made I would have received some of it.

Q. How was the money supposed to be made?

A. From playing cards.

Q. For what?

(No response.)

Q. For fun or for money? [798]

A. Well, it would be played for money.

Q. Wouldn't that be gambling?

A. I think it would be.

Q. Well, did you think that it wasn't gambling when you made that affidavit?

A. I wouldn't say.

Q. Now, when you sold the chips back after liquor was bought at your bar, who bought the chips back?

(Testimony of Joe Blackard.)

A. I don't know, I never sold any back. I know they came to the bar and got the chips and gave them to the bartender.

Q. Well, who got the chips back?

A. The boys at the tables.

Q. The dealer?

A. Who ever came to pick them up.

Q. Well, did you ever inquire as to how come they were buying whiskey at your bar without putting money on the bar?

A. There was very seldom that that was done but as far as inquiring I don't know. They would bring the chips there and they would come and pick them up later and pay money for it and they did that.

Q. Who gave the bartender permission to give drinks for chips?

A. I don't know if any permission was given. They will come in any say "I will pay you later."

Q. Did you wonder at that time if the chips were worth money? [799]

A. They would come around in an hour or five minutes later and pick them up, you would just think they were.

Q. You knew at that time the chips were worth money, did you not? A. I think so.

Q. Well, how much would one chip buy?

A. I don't know—I don't know, just don't know anything about the chips.

Q. Did they have different colored chips?

(Testimony of Joe Blackard.)

A. I think they do.

Q. What color chips do they have?

A. I wouldn't know. I don't know.

Q. Did they have white chips?

A. I think they did.

Q. Blue ones?

A. I wouldn't say, I imagine they did.

Q. Red ones? A. I don't know.

Q. You just remember that they had chips?

A. And they were colored chips—they was colored chips there.

Q. Were all the chips worth the same thing?

A. I don't know, I don't know anything about the chips.

Q. How many tables did you have?

A. There was two. [800]

Q. And how many days were card games played?

A. I wouldn't say, just a short while—ten days or two weeks, something like that.

Q. And during that two weeks' period who played in the games?

A. I really don't know, some of the customers that came in. Oh, that brings in a few people.

Q. During that period of time did you ever ask your dealer if he made any money for you?

A. Oh, yes.

Q. What did he say?

A. Didn't make any money.

Q. Did you ask him why?

A. There wasn't any money in town; there was no one spending any money at that time.

(Testimony of Joe Blackard.)

Q. Where did the money come from to buy the chips?

A. I have an idea that the fellows they had it themselves.

Q. Didn't you make any inquiry as to why the game wasn't making any money for the house?

A. When there are only three or four or five people around the table and you know that three or four or five of them that are sitting back there as shills or just sitting back there because they haven't got money or something, you just take it for granted there wasn't any money being made.

Q. You mean to say that for two weeks the house men played with one another? [801]

A. Oh, I don't know.

Q. How much of the profit were you to receive?

A. Well, if in a card game you are to receive half the profit.

Q. And the card games never made a nickel?

A. I don't know whether they did or not, I didn't receive any profit.

Q. None whatsoever? A. That is right.

Q. Not even a dollar?

A. To the best of my knowledge.

Q. Now when you bought the premises from Tibbitt what did you buy?

A. Oh, some equipment and good will, mostly.

Q. You paid \$20,000 for good will, did you?

A. No, I got some equipment, too.

Q. Well, what equipment did you get?

(Testimony of Joe Blackard.)

A. I got some equipment at the bar, I don't know exactly what it was. We had a bill of sale at that time.

Q. Where is the bill of sale at this time?

A. I don't know, it is possibly and probably burnt in the fire, unless you would have it like you got the rest of that stuff.

Q. When Mr. Tibbitt—the original lease Mr. Tibbitt had with Marvin Campbell's mother did that provide that it could [802] be assigned?

Mr. Cottis: I object, your Honor, the lease speaks for itself.

The Court: Overruled.

Q. (By Mr. McCutcheon): Could that lease be assigned? A. The original lease——

The Court: Wait a minute. Is the original lease in evidence?

Mr. Cottis: I don't know what counsel means by the "original lease" but a lease is in evidence.

The Court: Is counsel referring to the lease that is in evidence?

Mr. McCutcheon: I am not sure yet myself, your Honor.

Q. At the time you first negotiated with Mr. Tibbitt did he not have a lease with Mrs. Campbell at that time?

A. I imagine that he did, pretty sure that he did.

Q. And did he not negotiate a new lease with her? A. I think so.

Q. And the new lease could be assigned, could it?

(Testimony of Joe Blackard.)

A. One time to the best of my knowledge.

Q. Did you negotiate with Mr. Tibbitt before he got the new lease with Mrs. Campbell that it could be assigned once? A. That is right.

Q. How much did you pay Mrs. Campbell for the assignment? [803]

A. \$2,000 and a hundred dollars extra a month.

Q. And how much did you pay Tibbitt for the good will? A. \$20,000 plus equipment.

Q. What equipment?

A. Oh, I don't know, we had a bill of sale on it.

Q. Can you remember it to the best of your ability if the bill of sale is lost?

A. I don't know where the bill of sale is; I am afraid it is lost, I don't think we have it. I don't know whether Ralph has it, I know I don't have, although there was a bill of sale.

Q. As a matter of fact didn't you pay Tibbitt \$20,000 because he was able to get the privilege of one assignment from Mrs. Campbell?

A. Plus equipment.

Q. Can you remember any of the equipment?

A. There was a restaurant operating there.

Q. All right, what was there in it?

A. Oh, just whatever it takes to operate a restaurant. There was a counter and quite a bit of other stuff.

Q. Did you buy the bar or did that belong to Mrs. Campbell?

A. Well, I think that the bar had been remodeled

(Testimony of Joe Blackard.)

at one time—Tibbitt and Hardy had remodeled it—and on a lease you can't remove a bar from a lease, anything that is tied down.

Q. Then it belonged to Mrs. Campbell, didn't it?

A. I would say that it would. It would go to her at the end of the lease.

Q. Did you buy the cash register or did that belong to Mrs. Campbell?

A. I wouldn't say, I don't remember.

Q. How about the glassware, was that Mrs. Campbell's?

A. I don't believe it was, I don't know, I don't remember, there is quite a bit of stuff on there and I would be afraid to say that one thing was on and it would depend.

Q. Now, you say you started to put a cab stand in but Mrs. Campbell objected, is that right?

A. That is right.

Q. Did you know at that time that your lease prohibited you from putting in a cab stand?

A. I don't think it did.

Q. When you had the gambling games did you know your lease specifically prohibited your putting in gambling games?

A. Said that we could have card games.

Mr. Cottis: Object.

The Court: Overruled.

The Witness: The lease said we could have card games providing that they were approved by the law of the City of Anchorage and the Territory.

(Testimony of Joe Blackard.)

Q. If they were playing for money was that abiding by the law? [805]

A. I think the City was allowing, I think, if they played pan or anything it was allowed.

Q. Did you have any kind of a deal with Starns as to whiskey? Didn't you buy your whiskey from Starns?

A. No, I didn't, I bought most of my liquor and stuff from Anchorage Cold Storage and several other places and I bought a little bit that was originally that was bought by Mr. Starns from Tibbit and Mr. Hardy that was left in the storeroom, I bought some of that from him.

Q. How much did you pay for the quart of whiskey when you bought it from Mr. Starns as compared with the retail price here in town?

A. If I bought anything from Mr. Starns that way, and I did, he charged me the same thing that he would have to pay for it at Anchorage Cold Storage or that I would have to pay for it at Anchorage Cold Storage, I think.

Q. Didn't you have a deal with Mr. Starns that you paid double the value of the bottle and that was how he was in business with you?

A. I did not.

Q. At no time? A. At no time.

Q. You mean the two of you were on the lease and you constructed the premises but you bought your liquor from someone else? [806]

A. That I bought the liquor from someone else?

Q. Yes.

(Testimony of Joe Blackard.)

A. That is right, I bought the liquor from someone else.

Q. Did you testify that Mr. Barett complained to you about Humphries' credit?

A. No, I didn't say Mr. Barett, I said Mr. Andrews.

Q. Do you know Humphries owed Barett any money on April 1st? A. No, I don't.

Q. How much of a liquor stock did you carry on the premises?

A. Oh, at the time of the fire we had between four and five thousand dollars' worth.

Q. How much did you carry when you originally went in business?

A. When I originally went in business I didn't have but what Mr. Hardy and Mr. Tibbitt left on the back bar.

Q. How much was that?

A. I would say it was possibly \$500 worth or maybe \$800 or something like that.

Q. You paid Mr. Tibbitt \$20,000, is that correct?

A. That is right.

Q. Where did you get the \$20,000.

A. I went to the First National Bank and there was a little over \$11,000 I drew out—myself had in there of my own money, and I borrowed \$10,000 from Mr. Starns, and he put it in my name and I wrote the check for the whole thing. [807]

Q. Making a total of \$20,000?

A. Just a little over, if I remember right, on the liquor license.

(Testimony of Joe Blackard.)

Q. Who paid Mrs. Campbell the \$2,000?

A. Mr. Tibbitt paid Mrs. Campbell the \$2,000.

Q. Out of the \$20,000 you paid Mr. Tibbitt?

A. No, sir, he left \$2,000 in escrow in one of the banks in Seattle and if he signed that lease over to me the \$2,000 was to go to her, if he didn't he was to continue to hold the old lease that he had at \$300 a month and he was to keep his \$2,000, where if I get it, I was to pay \$400 a month plus \$2,000, and he gave a note—I gave him a note to pay him the \$2,000.

Q. How much did you have in The First National Bank?

A. I think that it was about \$11,000.

Q. And Mr. Starns loaned you ten thousand, did he?

A. That is right.

Q. Made a total of \$21,000.

A. I think a little more than that, but I think that was approximately what the check was for.

Q. After you paid the \$20,000 to Mr. Tibbitt you had a thousand dollars left, is that correct?

A. No, Mr. Tibbitt had already bought the liquor license and we had to pay him—I reimbursed him. The liquor license cost around a thousand dollars and I reimbursed him for eleven months of that.

Q. So you paid him \$20,000 and reimbursed him for eleven months of his license, is that correct?

A. That is right.

Q. And you reimbursed him for—how much did you pay him for the license? How much did you reimburse him?

(Testimony of Joe Blackard.)

A. Just for the time that I had was to use it; it was around \$900.

Q. Then you had a hundred dollars left, is that correct? A. What do you mean?

Q. When you opened your business up?

A. I had some money over in the bank, too.

Q. Maybe I misunderstood, you say you took \$11,000 from the First National Bank plus \$10,000 from Mr. Starns, paid Tibbitt \$20,000 plus the portion of the share of the unexpired part of the liquor license?

A. I think you did misunderstand me, because I said that there was some more money left over there in the bank at that time.

Q. How much money was that?

A. I don't know, it was some of my money.

Q. How much was left?

A. I couldn't tell you.

Q. Was it \$5,000?

A. No, it wasn't that much, I would say it was from one to two thousand. I don't remember exactly, I know I had some [809] more money over there at the time.

Q. Well, did you take an inventory of the items that you purchased from Mr. Tibbitt?

A. That is right.

Q. Well, can you remember any part of that inventory?

A. No, I don't, it was kind of a mixed up inventory. The cafe Mr. Hardy and Mr. Tibbit had

(Testimony of Joe Blackard.)

put it in themselves after they originally got the place from Mrs. Campbell. Before they got the place there was a small bar, a liquor store and may be some magazines and some candy. Anyway, they buy the place and I don't know what he had in the place and don't remember some of the stuff, maybe a safe was there, maybe Mr. Tibitt bought a safe and they gave me a bill of sale for that. There were several things, and maybe a new cash register, maybe two cash registers; in fact, I never looked at the bill of sale after the time we got it.

Q. Do you recall what part of the \$20,000 was good will, can you remember that?

A. I am fully convinced that there was a greater portion of it that was or a portion of it.

Q. Do you recall whether or not you had the items insured that you purchased?

A. I didn't—

Mr. Cottis: Objected to as immaterial and no relevancy. [809A]

Q. (By Mr. McCutcheon): You didn't have them insured?

The Court: Wait a minute.

Mr. Cottis: Same objection, your Honor.

The Court: I do not at the present see the purpose of this examination as to what articles were bought from Tibbitt, what difference does it make as to the issues between the plaintiffs and defendants here?

Mr. McCutcheon: Well, if the Court please, he

(Testimony of Joe Blackard.)

contends that he owned a restaurant business and I would like to show that he had it insured and for how much.

The Court: Very well, the objection is overruled, he may answer.

Q. (By Mr. McCutcheon): What insurance did you have?

A. I didn't take the insurance out. Mr. Hardy and Mr. Tibbitt had taken out insurance and it was for \$3,000 and it was taken out before I went into the Panhandle on the restaurant and at the time that they left they assigned it to me for \$3,000 on the equipment that was there before that I went in and I did receive \$3,000 on that equipment.

The Court: What is the last part of your answer, sir?

The Witness: On the restaurant equipment I received \$3,000 from the insurance that Mr. Tibbitt and Mr. Hardy had taken out and had assigned to me. [810]

Q. (By Mr. McCutcheon): Now, did you have the restaurant equipment insured?

A. That was the insurance I was talking about.

Q. Did you have the type of insurance where you could be paid so much for the loss of a day's business?

Mr. Cottis: I object, your Honor, as completely irrelevant. This is obviously a fishing expedition as to Joe's collectibility in case plaintiffs should—

The Court: Overruled.

(Testimony of Joe Blackard.)

Q. (By Mr. McCutcheon): Did you have an insurance policy with Sheahan-Knox Agency insuring you against loss of business in case of a fire?

A. That is right.

Q. How much were you to receive?

Mr. Cottis: I object as irrelevant.

The Court: Overruled.

Q. (By Mr. McCutcheon): How much were you to receive?

A. I don't remember exactly what it was. It was called a business interruption, use and occupancy or something.

Q. Was it up to \$40,000?

A. No, it wasn't quite \$40,000.

Mr. Cottis: May it please the Court, there was not a word in direct examination about insurance and this is an improper cross-examination when he gets into that subject and I object to the whole matter of insurance except as it has [811] pertinency as to possible value or purchase price. If that is——

The Court: As far as the restaurant is concerned it is certainly relevant in my judgment.

Mr. Cottis: May it please the Court, is counsel restricted to inquiries respecting restaurant insurance?

Mr. McCutcheon: I am trying to cross-examine, sir, to bring out some of these points. Surely I am privileged to cross-examine to some extent.

The Court: It is necessary to stay within the scope of the direct examination and within the

(Testimony of Joe Blackard.)

scope of the pleadings. Now what insurance he has for loss of business at his bar doesn't bear upon the question here. Any insurance that there was upon the restaurant is revelant. No, there is no dispute here as to the ownership or right to operate the bar and, consequently, what the witness may have received or may receive in the future for the loss of the business at the bar has nothing to do with this case.

Q. (By Mr. McCutcheon): Mr. Blackard, I will hand you a paper here entitled "Insurance Policy" and ask you if it isn't made out in your name? A. That is right.

Q. And does it purport to insure the Panhandle Bar and Cafe?

A. I don't remember—don't know.

Q. Does it say Panhandle Bar—— [812]

Mr. Cottis: Same objection, your Honor.

The Court: Same ruling, overruled; if it refers to the Cafe it may be admitted.

The Witness: Joe Blackard, doing business as Panhandle Bar and Cafe.

Q. (By Mr. McCutcheon): What was the amount of that policy? A. For \$2500.

Q. And what was that insurance on with reference to the Cafe? A. I don't know.

Q. Well, at the time you entered into this insurance agreement you estimated the value of the Cafe to be less than \$2500, is that correct?

(Testimony of Joe Blackard.)

A. Of the stuff that I had in there.

Q. Well, I will hand you another paper that has a title "Insurance Policy" and ask you who that is made out to?

A. Joe Blackard, dba The Panhandle Bar and Cafe.

Q. What is the value of that insurance policy?

A. \$4,000.

Q. What was that on?

A. On merchandise and that was the merchandise that they paid me that \$4,000 on the merchandise on the liquor that I had on the bar side and they taken inventory and there was no inventory at all whatsoever on the cafe because at that time Mrs. Cavins owned all the inventory that would have been over at the Cafe. [813]

Q. Well, how much money and insurance did you collect altogether?

Mr. Cottis: I object, your Honor, as completely irrelevant.

The Court: Overruled.

The Witness: Now, do you mean the bar or the cafe?

Q. (By Mr. McCutcheon): The total amount of insurance on the Panhandle premises, what did you recover?

Mr. Cottis: May it please the Court, if I understood the Court's ruling, Mr. Blackard was to be restricted to restaurant insurance and counsel's question——

(Testimony of Joe Blackard.)

The Court: That is right, counsel has a right to inquire to determine whether the insurance is on the bar or the cafe. Witness may answer.

The Witness: I received \$3,000 on the cafe. I received \$4,000 on merchandise loss in the first and received——

The Court: When you say “merchandise” what merchandise do you mean?

The Witness: That was stuff lost that I had for my operation of the bar. At that time I didn’t own any merchandise on the cafe. Miss Cavins owned that.

Mr. Cottis: Then, your Honor, I ask that his testimony be stricken as to that portion pertaining to the bar.

The Court: Jury will disregard the testimony concerning [814] the bar. It has no relevancy here. What testimony concerning the cafe may be relevant is for the jury to decide how important it is, if at all

Q. (By Mr. McCutcheon): Well, I will hand you another insurance policy and ask you what that covers—as far as it pertains to the cafe?

A. Well, it has got me here again as doing business as the bar and the cafe, Joe Blackard’s Panhandle Bar and Cafe, 314 Fourth Avenue, Anchorage, Alaska.

Q. As far as the cafe what did that policy insure?

A. That covered the equipment I bought from

(Testimony of Joe Blackard.)

Mr. Starns—I mean Mr. Tibbitt and Mr. Hardy—when I originally went in there.

Q. What was the value of it?

A. I really don't know.

Q. How much does that insurance policy cover?

A. The insurance policy?

Q. I will withdraw that question for a moment, Mr. Blackard. Did you not have an insurance policy with Sheahan-Knox Agency covering you doing business in the bar and the cafe and covering you in the event the premises were destroyed or partially destroyed by fire, didn't you have an insurance policy that paid you so much a day for loss of business up to \$40,000?

Mr. Cottis: Objection, your Honor, unless it is restricted to the cafe and even then I object because none of it has [815] any bearing on the direct examination.

The Court: If any part of it has to do with the cafe and it was all blended together under one policy then the question must be answered; if the policy referred to the bar alone it has no relevancy here. You may answer the question.

The Witness: I don't remember when we taken out this policy, I think it was along the first of September this business interruption insurance. Mr. Sheahan at that time, it was his business to sell insurance and he came to my place quite often and he drinking there and he was a pretty good friend of mine, he comes in, oh, along the early in the

(Testimony of Joe Blackard.)

spring, may be along in March and wants to sell me this business interruption——

Mr. Cottis: I object, your Honor, the answer isn't responsive and I would like to have the question re-read.

The Court Better answer the question. The question was as to whether you took out such an insurance policy. You needn't go into all details as to how you came to take it out or not take it out.

The Witness: Not a \$40,000 policy.

The Court: Well, what did you take out?

The Witness: Thirty-seven five.

The Court: And how far did it apply to the cafe?

The Witness: It was on any business that I operated there and the Panhandle Bar and Cafe, and if I had a fire it was to cover that coverage to how had the fire was. [816]

The Court: Did it cover both the bar and the cafe?

The Witness: It covered both the bar—not the bar and no equipment, it covered the business, if I had taken away the right—that thirty-seven five—Mr. Beaver was keeping our books and they got him to arrive at those figures, I think we would take in \$45,000 in one year.

Q. (By Mr. McCutcheon): By thirty-seven five, do you mean \$37,500?

A. That is right, and for operation of the business for one year that would have been the profit

(Testimony of Joe Blackard.)

that the bar and the cafe, the air lines office and the \$175 from Larry Starns' liquor store would have taken in.

Q. Is there a dispute about the payment of that?

Mr. Cottis: Your Honor, I object.

The Court: I didn't hear the question.

Mr. McCutcheon: I asked if there was a dispute about the payment of it.

The Court: Objection sustained.

Q. (By Mr. McCutcheon): Have you been paid?

Mr. Cottis: Same objection, your Honor.

The Court: Sustained.

Q. (By Mr. McCutcheon): What part of that insurance policy covered the cafe?

A. The cafe was originally covered by the \$3,000 that Mr. [817] Hardy and Mr. Tibbitt gave to me when I bought the place—just a short while before I bought it they had went up to Ed Coffey not Sheahan—Ed Coffey and had a \$3,000 policy taken out. I didn't ever receive the policy that I remember and they assigned it over to me or told me to go change it and take it out of their name and put it in mine and Mr. Tibbitt and Mr. Hardy after the fire or just a short while back, less than a month ago, Mr. Tibbitt says that they have the \$3,000 policy still down at their place, that I never had it. I don't remember whether I got a duplicate or not. I know it was assigned over to me and the \$3,000 on the equipment was paid to me shortly after the fire.

(Testimony of Joe Blackard.)

Mr. McCutcheon: May we suspend?

The Court: It is now twelve o'clock. The trial will be continued until two o'clock.

Ladies and Gentlemen of the Jury, you will not discuss the case among yourselves or with others, nor listen to any conversation about it or form or express an opinion until it is finally submitted to you. [818]

Afternoon Session

The Court: Clerk may call the roll of the jury.

(Jurors' names were called and responded to.)

The Clerk: They are all present, your Honor.

The Court: Mr. Blackard may resume the stand.

JOE BLACKARD

previously called as a witness on behalf of the defendants, resumed the stand and testified as follows:

Direct Examination

By Mr. McCutcheon:

Q. When did you and Mr. Phillips first become partners, Mr. Blackard?

A. Shortly after we opened up the Panhandle.

Q. And how long after you opened the Panhandle was that?

A. I don't remember, Glen drew a couple of checks as a bartender—a month or six weeks—two months, something like that.

(Testimony of Joe Blackard.)

Q. And he is now working at the Village Bar, is that not right? A. I think so.

Mr. McCutcheon: No further questions.

The Court: Any further direct examination?

Mr. Cottis: Yes, your Honor.

Redirect Examination

By Mr. Cottis: [819]

Q. Joe, I call your attention to the affidavit dated May 17th and particularly to the statement in it over your signature that no gambling is permitted by me in the premises. I would like you to explain that statement, if you can, a little farther for the Court?

A. Well, we already at that time I had strictly had stopped it. I only allowed a game of any kind at all to go for about ten days there and Mr. Campbell was displeased and everyone was displeased. No one was making any money and we were getting a little traffic was all that was coming in. Some of the people were coming to play the games and that was on May 17th I signed this statement and there was no card playing. I think the tables were even turned bottom side up at that time and if they weren't they wasn't being used and hadn't been used for a teriffic—for quite a while.

Q. As nearly as you can remember how long prior to the date of that affidavit, May 17th, was it that you discontinued the card game?

(Testimony of Joe Blackard.)

A. Oh, six weeks to two months—for one to two months.

Q. And there had been no card playing permitted in there then since the first part of April sometime? A. I would say not.

Mr. Cottis: No further questions unless the Jury—— [820]

The Court: Any further cross-examination?

Recross-Examination

By Mr. McCutcheon:

Q. Mr. Blackard, in whose name was the liquor dispensing license issued?

A. It was mine and then when Glen Phillips it went in the combined, they put it in my name and Glen's name. When Mr. Tibbitt and Mr. Hardy transferred the license to my name and then a couple of months later it was transferred over to Mr. Phillip's name and mine.

Q. I would like to be clear on one, do you now deny or admit that there were gambling games conducted on the Panhandle premises during the period of time that the plaintiff held a lease there?

Mr. Cottis: I object to the question, your Honor, there is no evidence that the plaintiff ever held a lease there.

The Court: Objection is sustained.

Q. (By Mr. McCutcheon): During the period of time that an agreement existed between you and Mr. Humphries?

A. Now, what did you say again now?

(Testimony of Joe Blackard.)

Q. Do you now admit or deny that gambling games were conducted on the Panhandle premises during the period of time that an agreement existed between you and Mr. Humphries?

A. I said that we had card games there for about eight days to twelve days.

Q. Was that during the period of time that an agreement [821] existed between you and Mr. Humphries?

A. I think so.

Q. Well, were the card games for money?

A. I didn't get any money from it. I have an idea that they probably were, yes.

Q. Well, you had a dealer there, didn't you?

A. That is right.

Q. And your agreement with the dealer was that you were receive fifty per cent of the profits, is that correct?

A. If there was any money taken in.

Q. If there was any money taken in. Do you know why there wasn't any money taken in?

A. Well, there was no one particular playing the card games.

Q. Where was the money to come from that you hoped to take in?

Mr. Cottis: Your Honor, I object, the question is too vague.

The Court: Overruled.

Q. (By Mr. McCutcheon): Where was the money to come from that you hoped to take in?

A. That would come from a card game when a fellow sits down to play in a card game, I think.

(Testimony of Joe Blackard.)

Q. Did they sit down and play cards?

A. If they had a card game they must have.

Q. You were there off and one, weren't you?

A. Yes, I was around considerably.

Q. And what was the name of your first dealer?

(No response.)

Q. Who did you first employed as a dealer there?

A. I don't remember his name—go ahead.

Q. Did you employ someone else following him?

A. That is right.

Q. What was his name?

A. A fellow by the name of Preston.

Q. Then did you employ someone else?

A. No.

Q. Just the two dealers? A. That is right.

Q. And they were charged with the responsibility of running the card games, were they not?

A. They had access to my two tables that were sitting in the back of my place. If they got someone to play they could play. The tables were finally turned bottom up.

Q. The proposition was you were to get fifty-per cent of the profits, is that right?

A. If there were any profits.

Q. They played, didn't they?

A. They played.

Q. What kind of an agreement did the dealer have with those [823] who played?

A. I don't know.

(Testimony of Joe Blackard.)

Q. Didn't he take a percentage of the pot or the bet?
A. I don't know.

Q. Did you ever inquire as to why you weren't making any money out of the card games?

A. He said he was taking no money in.

Q. Did you know it was unlawful?

A. I wouldn't say it was unlawful, we were doing no more than——

Q. You know it is unlawful to play cards for money, don't you?

Mr. Cottis: Now, you Honor, I can't see what difference it makes whether Mr. Blackard does or doesn't know?

Mr. McCutcheon: On redirect examination, your Honor, counsel brought out the matter of the affidavit and that he denied that there was gambling on the premises at a certain time and I want to clear that point up.

The Court: This has been gone over before. I realize that cross-examination may have a wide scope. I think all of these questions were asked originally upon cross-examination.

Mr. McCutcheon: Very well.

Q. Is that your signature at the bottom of the page?

The Court: Witness may examine the paper if he desires?

The Witness: Could you show me this other part you are [824] talking about?

The Court: The question is, is your signature affixed?

(Testimony of Joe Blackard.)

The Witness: That is my signature.

The Court: That is the answer, the only proper answer. You may examine the whole paper, if you wish.

Q. (By Mr. McCutcheon): And that is a denial of the plaintiff's complaint, is it not?

A. To a certain extent.

Q. Now in the plaintiff's complaint it is alleged that you conducted gambling games there, is it not?

A. That is right.

Q. And in this answer you deny it, is that correct?

A. As far as I know I deny it.

Q. You denied it under oath, did you not?

A. I don't know.

Q. Well, what does it say at the bottom of the page there?

A. It says—doesn't say what—one or two is up on top.

Q. Wasn't it your understanding that when you signed that paper that you took the oath that the facts contained in that denial are true?

A. I imagine.

Q. Doesn't it say so there?

A. Says down at the bottom.

Q. When you took that oath before Mr. Cottis, didn't you [825] raise your hand and swear that it is true as it says there on the paper?

A. I imagine that I did.

Q. Now what do you say now, was there gambling there now or wasn't there?

A. I said there was card tables there.

(Testimony of Joe Blackard.)

Mr. Cottis: Your Honor, I object to this as having been asked before.

The Court: Objection overruled.

Q. (By Mr. McCutcheon): Did you not on May 10th, 1948, in the presence of the United States Commissioner, a jury of twelve, myself, Mr. Humphries, and Mr. Campbell and other persons being present, did you not then testify that there was no gambling on the premises? A. I don't know.

Q. How long did the games run?

A. We had fellows around the table back there and around the card games for about, I would say, eight to twelve days, something like that, and Mr. Campbell and everyone was very unhappy about the situtaion so we moved the boys out and cleared the tables away.

Q. Now, was that after a notice terminating your lease was served on you?

A. I don't know; I don't remember the date.

Q. Do you recall that a notice terminating your lease was [826] served on you because you were conducting gambling games in the premises?

A. Yes.

Q. And was it following that that you closed the games up? A. I don't think so.

Q. When was it that you closed the game up with reference to the time the notice was served on you?

(Testimony of Joe Blackard.)

A. It may have been before Mr. Campbell may have said something about he didn't like card games in here and it could have been that the city stopped it, I couldn't say.

Q. Mr. Campbell complained about the card games being there, is that not correct?

A. I said he might have.

Q. What occasioned you to think just now he complained about the card games?

A. I said he could have.

Q. Do you know whether or not he did?

A. I couldn't swear to it; I couldn't say that he did.

Q. And following the service of the notice terminating your lease you served a notice on Mr. Humphries to quit the premises, isn't that right?

Mr. Cottis: Not bearing upon the direct examination, object.

The Court: Overruled.

Q. (By McMcCutcheon): Isn't [827] it true that following the notice by Mrs. Campbell cancelling that you served a terminataion on Mr.—

A. I couldn't say.

Q. Wasn't the notice served on Mr. Humphries following the notice terminating the lease served on you? A. I said I don't know the dates.

Mr. Cottis: Your Honor, counsel has brought in new matter and I ask the Court's indulgence to ask one question?

The Court: Go ahead.

(Testimony of Joe Blackard.)

Mr. Cottis: Joe, the answer in this action which you signed denied this complaint and I would like to read to you the allegation in here with respect to gambling games—paragraph 14 “That defendants have maliciously, wilfully, unlawfully operated and conducted gambling games interfering with and otherwise being detrimental to plaintiff’s business, all to plaintiff’s damage.” Now at this time do you still deny that allegation 14?

A. The Witness: Yes, I would.

Mr. Cottis: That is all.

Mr. McCutcheon: May I close, your Honor?

The Court: Yes.

Q. (By Mr. McCutcheon): Now, do you deny that there were gambling games played there at that time and place, do you say that that isn’t true?

A. As far as I know, it wouldn’t be. [828]

Q. You don’t know whether or not there were gambling games back there?

A. I know there were card tables.

Q. Did the people play cards?

A. I would say they did.

Q. Did they have chips in front of them?

A. I imagine.

Q. And you had dealers working, would you, back there? A. There were dealers back there.

Q. And you swapped drinks for the chips?

A. I imagine they did.

Juror: Where did the mirrors in the restaurant come from?

(Testimony of Joe Blackard.)

The Witness: From the old back bar.

Juror: Were they there when you got the place from Tibbit?

A. Yes, we remodeled the old bar and put new mirrors up on it.

Juror: But they came with the place when you got it from Tibbitt and Hardy?

The Witness: Yes.

Juror: In this deal between Mr. Humphries and Mr. Graves do you know what that \$2500 or some such amount was supposed to buy?

The Witness: Yes, Ma'am. I don't think it was quite [829] \$2500, I don't know, but I don't think it was, and it was to buy some meat saws that Mr. Humphries was to cut his own meat and he was going—a meat saw is a great large saw—and he was to cut meat for Sunshine Market and a few other people so far as I remember, and he had a cube machine that wasn't in the place that he cubed his own steaks and I think there was a larger icebox—a 3-door icebox—that was to come with Mr. Graves' and he got the new stools instead of the old ones. He kept the new ones. There were old stools there but rather than keep those without backs he kept the new ones which had backs on them and the old stools were left in the basement and there was a few other things. I think there were more meat grinders or saws or something like that.

Juror: Did any of that price include any of the equipment within the restaurant proper?

(Testimony of Joe Blackard.)

The Witness: I have an idea there would have been a few odds and ins that Mr. Graves would have placed in there other than breakage and stuff. You see, there was a restaurant operating there when Mr. Graves came in, just about a year previous even, and I have an idea that that would have been just been breakage and stuff and extra dishes that he put in, maybe a few pans that he had bought to put in.

The Court: That is all, Mr. Blackard, you may step down; another witness may be called.

Mr. Cottis: I will call Laurence Starns. [830]

LAURENCE STARNS

called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Will you spell your name, Larry?

A. Laurence Starns, L-a-u-r-e-n-c-e S-t-a-r-n-s.

Q. And you are the same Laurence Starns who is named as a defendant in this action?

A. Yes, sir.

Q. Did you operate a liquor store in the Panhandle premises in the spring of 1948?

A. Yes, sir.

Q. Under what arrangements and with whom did you operate that store?

A. I operated the store myself.

(Testimony of Laurence Starns.)

Q. Did you have a lease of the premises?

A. There was a lease, yes.

Q. And how did the lease run?

A. The lease was in Mr. Blackard and my name.

Q. Were you and Mr. Blackard partners?

A. No, sir.

Q. What was the relationship between the two of you?

A. I loaned Mr. Blackard a sum of money in order that he could make the deal with Mr. Tibbitt and Mr. Hardy for the bar. [831] And then in return for that he was to—I was to have space for a liquor store in that building.

Q. And were you to pay any portion of the rent?

A. I paid \$175 a month.

Q. To whom did you pay that?

A. I paid that to Mr. Blackard.

Q. Now what, if any, was your relationship with Vernon Humphries or Marvin Campbell?

A. I have never had any dealings with either one of them.

Q. Well, during February of 1948 while there was construction going on in the Panhandle premises did you hire Mr. Humphries as a paper hanger? A. I did not.

Q. Do you recall any conversations that you had with Humphries during that period?

A. No.

Q. Did you ever agree with Mr. Humphries that you would pay his plumbing bill?

A. No, sir.

(Testimony of Laurence Starns.)

Q. Who did the construction work for your liquor store at those premises?

A. I had my own crew of carpenters that were working on another job for me and I brought my own men and material in and did the work myself with the exception of the front—front of the building that Bliss did. [832]

Q. With respect to the front of the building what arrangement, if any, did you have with Blackard or with Bliss?

A. Well, I had no arrangement with Bliss at all; I had a talk with Mr. Blackard about it and told him that I would pay half on the front because I had to have an opening for my liquor store.

Q. Did you ever tell Humphries that you would take care of the three-thousand dollars' bond that he was supposed to furnish Blackard?

A. I never heard anything about it, don't know anything about it.

Q. Do you know why you are a defendant in this suit? A. I do not.

Mr. Cottis: Your witness.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. McCutcheon:

Q. You signed that assignment, did you not, Mr. Starns?

The Court: What document is counsel referring to?

(Testimony of Laurence Starns.)

Mr. McCutcheon: Plaintiff's Exhibit 18.

The Witness: Plaintiff's Exhibit 18, yes, sir, I signed that.

Q. And by that assignment you agreed to be bound by the terms of plaintiff's Exhibit No. 17, did you not?

A. This is the assignment of the lease? What was your question again? [833]

Q. And by that assignment you agreed to be bound by the terms of that lease, is that correct, plaintiff's Exhibit 17?

Mr. Cottis: Your Honor, the assignment speaks for itself and I object to the question.

The Court: Objection is sustained.

Mr. McCutcheon: Very well.

Q. You say you paid \$175 a month to Mr. Blackard? A. Yes, sir.

Q. And he paid the total sum to Mrs. Campbell, is that correct? A. As far as I know it is.

Q. What would happen to your position if Mr. Blackard failed to pay the rent?

A. I don't understand.

Q. If Blackard failed to pay the rent under the lease where would your position have been?

A. Well, I don't know.

Q. Well, weren't you interested in seeing that the rent was paid? A. I paid my rent.

Q. To Mr. Blackard? A. Yes.

Q. Did you consider yourself a sub-tenant of his? A. No. [834]

(Testimony of Laurence Starns.)

Q. You were a tenant of Mrs. Campbell's, were you not? A. Right.

Q. And you agreed that no gambling would be conducted on the premises, did you not?

A. I didn't conduct any gambling.

Q. You agreed that no gambling would be conducted on the premises, did you not?

A. As far as the gambling is concerned I don't know what you were talking about.

Q. Was there any gambling ever on the premises? A. I don't know.

Q. Did you ever see any?

A. I don't believe I was—in my liquor store, I was seldom in the rest of the premises.

Q. Were you ever in the restaurant premises?

A. Oh, yes, sir.

Q. Did you ever see any gambling there?

A. No, I don't recall seeing any gambling there.

Q. Did you ever see any card tables?

A. Yes, I seen card tables. There had been card tables in the Panhandle Building there for years and years.

Q. Weren't you concerned about the card tables being there, that it might constitute a violation of the lease that there might be gambling going on?

A. I don't get alarmed at seeing gambling.

Q. Now in connection with the construction of the remodeling didn't you and Mr. Blackard go to McCarrey and have an agreement drawn with reference to that remodeling?

A. With reference to what?

(Testimony of Laurence Starns.)

Q. With reference to the remodeling of the Panhandle premises, liquor store, front, bar and cafe?

A. Well, I recall going to Mr. McCarrey's office, yes, it was in relation to Mr. Bliss' contract with Mrs. Campbell, I believe. If I recall Mr. McCarrey had to o.k. the contract with Bliss for Mrs. Campbell before they would do any work. After we took over the lease Mrs. Campbell wanted to put up—wanted to remodel the building and put a new floor throughout. Well, before I could put my liquor store in or any work could be done we had to wait for that new floor to be put in.

Q. And she did do that, did she?

A. Yes, sir.

Q. Do you recall when a notice terminating the lease was served on you?

A. No, I don't recall the date.

Q. You remember that a notice was served on you, do you not?

A. Well, I don't recall it, no, I don't.

Q. Do you remember whether you were named defendant in an eviction suit?

A. No, I don't recall the date.

Q. Do you remember the trial? [836]

A. No, I don't remember the trial.

Q. Do you remember the outcome?

A. I don't know anything about it.

Q. Don't you remember testifying at that trial?

A. Now, wait a minute, what was it?

(Testimony of Laurence Starns.)

Q. Well, wasn't it last May 10, 1948?

(No response.)

Q. And haven't you posted bond on an appeal of that case? A. Where was the trial?

Q. Wasn't the trial in the United States Commissioner's Court in this Court House?

A. Did I testify?

Q. Well, I am asking the question?

A. It is possible I did, if I did the records will show it, I don't recall.

Q. Do you remember Mr. McGee testifying in your behalf?

Mr. Cottis: Your Honor, I fail to see the bearing on the direct examination.

Mr. McCutcheon: I am trying to help him out, he has lost his memory completely on that part.

The Court: Objection is overruled.

Q. (By Mr. McCutcheon): Don't you remember the owner of the Cheechako testifying for you?

(No response.) [837]

Q. Don't you recall Leo Tyler testifying for you?

Mr. Cottis: I object, your Honor——

The Witness: I don't believe I was present when that was taking place.

The Court: Overruled.

Q. (By Mr. McCutcheon): Don't you recall signing an appeal bond in connection with an eviction suit over the Panhandle premises a year ago?

(Testimony of Laurence Starns.)

A. May I see it, I can tell if I did.

Q. If you would like to. Does that help to refresh your memory? A. Yes, I signed this.

Q. That is an appeal bond from an eviction suit in the Commissioner's Court over eviction from the Panhandle, isn't that right? A. Yes, sir.

Mr. Cottis: I object, your Honor, on the grounds it has no relation to the direct examination.

The Court: Overruled.

Q. (By Mr. McCutcheon): Now, do you remember Mr. McGee testifying for you at that trial?

(No response.)

Q. Do you now remember it?

A. No, I don't.

Mr. Cottis: Your Honor, I object, he has answered the question, the fact that he has signed the bond is no indication that he was even present at the trial.

The Court: Overruled.

Q. (By Mr. McCutcheon): Now, do you remember Mr. Fred Mayer testifying for you, of the Cheechako Tavern?

A. I don't believe that I was present at that time.

Q. And do you remember Barney Perlman—

Mr. Cottis: Your Honor, I certainly object, the witness has answered again and again that he doesn't believe that he was present and Mr. McCutcheon is hauling out a stream of witnesses here.

The Court: Overruled, witness has testified that he had no interest in the operation of the premises

(Testimony of Laurence Starns.)

and this is, I think, legitimate cross-examination upon that point.

The Witness: I don't believe that I was present when Mr. Perlman testified.

Q. (By Mr. McCutcheon): Do you know Bob Brooks? A. Bob Brooks?

Q. Yes. And do you remember his testimony at that trial? A. No, sir.

Q. Who is Bob Brooks?

A. Well, if we are referring to the same person—— [839]

Mr. Cottis: Your Honor, we are getting into a collateral matter and I object further on that ground.

The Court: Overruled.

The Witness: Who is he?

Mr. McCutcheon: Yes, who is Bob Brooks and what is his occupation?

A. I don't know what he is doing right now.

Q. Do you know what his occupation was on May 10th, 1948?

A. I do not, no, sir, I have known Mr. Brooks for years but he has been in several different types of business and I don't know what he was doing at that time.

Q. Isn't his chief occupation the gambling business? A. I don't know.

Q. Do you know Barney Perlman?

A. Yes, sir.

Q. What is his occupation?

(Testimony of Laurence Starns.)

A. He was a card dealer, I think, and a bartender.

Mr. Cottis: Same objection, Your Honor, and an additional objection of this hauling names of gamblers out of a hat will give the jury some sort of notion that they had something to do with the Panhandle premises.

The Court: Objection is sustained and the jury will disregard testimony of gamblers if they did appear at another trial.

Mr. McCutcheon: Very well, sir. [840]

Q. Do you remember the trial now, Mr. Starns?

A. You told me the date, May 10th, that was during this period of time when I was finishing up my place out on east Fifth; in fact I opened it on May 22nd and I was spending practically all my time out there, and I remember—I recall about the time of the trial but I don't believe I spent any time there myself.

Q. But you do remember that a trial was had?

A. Yes, I do remember that there was a trial.

Q. And you do remember that you were a defendant? A. Yes.

Q. Now, did you say that you had no interest in the Panhandle business whatsoever?

A. I owned the liquor store. I had this interest in the bar that I had loaned Mr. Blackard \$10,000 and I had a chattel mortgage and recorded on his stock and equipment that he owned in there.

Q. Well, weren't you Mr. Humphries' landlord?

(Testimony of Laurence Starns.)

A. Not that I know of.

Q. Well, weren't you the tenant of Mrs. Campbell?

A. Yes, I was a tenant of Mrs. Campbell.

Q. And wasn't Mr. Humphries a sub-tenant of yours? A. Not of mine.

Mr. Cottis: Object, it calls for a conclusion.

The Court: Overruled. [841]

Q. (By Mr. McCutcheon): Wasn't Mr. Humphries a sub-tenant of yours?

A. Not of mine, no, sir.

Q. Who was he a sub-tenant of?

A. I don't know.

Mr. Cottis: Object, Your Honor, it is obviously outside the witness' knowledge.

The Court: Overruled.

Q. (By Mr. McCutcheon): Do you know whether or not he was a sub-tenant?

A. I do not.

Q. You saw him in the premises? A. Yes.

Q. Did you know that there was an agreement between him and Mr. Blackard?

A. I did not.

Q. You never discussed it with Mr. Blackard?

A. No, sir.

Q. You were not concerned with whom were tenants in the premises at all, is that correct?

A. No, I wasn't concerned, my only concern was the liquor store.

Q. Well, were you concerned as to whether or

(Testimony of Laurence Starns.)

not Mr. Blackard paid the rent to Mrs. Campbell?

A. I took it for granted that he did. [842]

Q. Well, were you concerned about it?

A. No, I wasn't concerned about it, you mean upset?

Q. No, wasn't that your business?

A. —

The Court: Counsel had better explain by what it means by "concern" it has several meanings.

Q. (By Mr. McCutcheon): Wasn't it very important to you—wasn't it your business—weren't you concerned about it—did it make any difference to you whether or not he paid the rent to Mrs. Campbell?

A. I thought he was paying the rent to Mrs. Campbell.

Q. You were concerned about it, it was of interest to you? A. Yes.

Q. As a matter of fact you agreed to pay her yourself, didn't you?—

(No response.)

Q. —you and Mr. Blackard?

Mr. Cottis: Your Honor, the agreement speaks for itself.

The Court: Well, the witness can answer, if he doesn't know that I don't know why he is testifying.

The Witness: It was my understanding of the original deal was that Mrs. Campbell—the reason

(Testimony of Laurence Starns.)

my name appears on the lease is that Mrs. Campbell would only permit one assignment of the lease, would only permit Mr. Tibbitt to make one assignment. My only interest was renting space there to put [843] in a liquor store. I had no desire to go into the bar business. I loaned Mr. Blackard \$10,000 so that he could make the deal and take over the place and in return I was to have the space for the liquor store. The reason my name was on the lease was because that Mrs. Campbell would only permit Mr. Tibbitt to make one assignment and one assignment only and for that reason the lease was made out to Mr. Blackard and myself.

Mr. McCutcheon: No further questions.

The Court: Any further direct examination?

Mr. Cottis: No, Your Honor, unless the jurors want to inquire?

(No response).

The Court: That is all, Mr. Starns, you may step down. Another witness may be called.

Mr. Cottis: With your indulgence, Your Honor, we will run into the witness room and see who is there.

The Court: Very well.

Mr. Cottis: Call Clyde Graves.

CLYDE GRAVES

called as a witness on behalf of the defendants,
being duly sworn, testified as follows:

Direct Examination

By Mr. Cottis:

Q. Your name is Clyde Graves?

A. That is right. C-l-y-d-e G-r-a-v-e-s. [844]

Q. And what is your occupation, Mr. Graves?

A. I am General Manager of Universal Food
Service.

Q. Are you living in town now?

A. No, sir.

Q. When did you arrive in town?

A. At ten minutes after one today.

Q. Are you the same Clyde Graves who once
operated the restaurant at the Panhandle?

A. That is right.

Q. Do you recall Vern Humphries here?

A. Yes, sir.

Q. Did you have any dealings with him in con-
nection with that restaurant? A. I did.

Q. Will you tell us what they were?

A. Vern Humphries and Kenneth Havins they
bought the cafe from me; they paid me \$2250 for
it. They paid me \$1150 in a check and \$1100 in
cash.

Q. You are sure that they gave you a check?

A. Yes, sir.

Q. Do you recall who signed it?

(Testimony of Clyde Graves.)

A. I believe, I know it wasn't Vern himself, it was someone, but his last name was Humphries.

Q. And the total purchase price was \$2500 did you say? A. \$2250.

Q. Now, what went with the business or with the restaurant that you sold to Humphries?

A. I didn't get your question there.

Q. What, if anything, in the nature of inventory equipment, goodwill or that sort of thing was included in that sale?

A. I didn't sell him the food I had in the cafe, I sold that to someone else. I sold him the equipment that belonged to me. It was not furnished when I took over the cafe about a year before.

Q. It wasn't furnished?

A. No, not the equipment, it wasn't complete.

Q. Was it complete when you sold it to Humphries?

A. I figured it was, yes.

Q. Clyde, when you say "complete" do you mean complete in all respects as to dishes and equipment and utensils?

A. Yes, I would put it this way—I figure a cafe complete, what merchandise you have got to work with, it saves labor. I put in meat saw, icebox, I put in new counters and stools and I put in a grinder and miscellaneous dishes.

Q. How long had you operated the restaurant before you sold it to Humphries?

A. I would say 18 months.

(Testimony of Clyde Graves.)

Q. How had you done—good, bad or indifferent?

Mr. McCutcheon: Objected to as immaterial.

The Court: Objection is sustained. [846]

Mr. Cottis: Your Honor, I respectfully point out that the preceding business conducted there would have some bearing on whether there was any loss of profits to the plaintiffs here. They have been unable to provide any figures on their own operations.

The Court: Well, in every business much depend upon management, skill and so on, and I think if we open that door we may get in a vast volume of testimony that has very little bearing on the question.

Mr. Cottis: Very well, Your Honor, I will withdraw the question.

Q. Mr. Graves, I will put before you Defendant's Exhibit F and ask you whether you have ever seen it before. You may take your time and read it, if you like. Do you recall that, Mr. Graves?

A. I do.

Q. Is that your signature on it?

A. That is.

Q. As a witness? A. Yes, sir.

Q. Did you see the other people sign that?

A. I did.

Q. Are you sure, Mr. Graves, that you saw Humphries sign that? A. I did. [847]

Q. Are you sure that it was not another agreement similar to that but written in pencil?

(Testimony of Clyde Graves.)

A. No, sir.

Q. You are positive that that is the agreement that Humphries signed?

A. The fact is, I wrote this out first myself and I asked Joe, I said to me it wouldn't make good sense, I said why don't you write it out and let them sign it and I will witness it, and that is what we did.

Q. Do you recall which hand Mr. Humphries signed it with?

A. No, sir, I don't.

Q. How much of your purchase price did you say was paid by check? A. \$1150.

Q. Did the check clear all right?

A. No, sir, the fact it took three days before it finally cleared and I went and checked on the check first and there was insufficient funds in the bank.

Q. And do you recall about what day and month that was?

A. No, I would say—no, I couldn't say, I know it was in February sometime and I know it was on Friday, I do remember that.

Q. Did you ever see a bill of sale from Hardy and Tibbitt to Blackard?

A. No, sir, I didn't. [848]

Q. Did you ever have any dealings with Laurence Starns?

A. No, sir, I haven't.

Q. What was the condition of the equipment in the restaurant that you sold to Humphries?

(Testimony of Clyde Graves.)

A. I would say it was better than fair all the way through.

Q. Do you recall how long you had had that equipment?

A. Well, I would say only—on the meat grinder—on the meat saw—and the slicer—I had that about six months; on the icebox we put that in and I had to turn around and ship another unit from Seattle for it, so it didn't go in operation until I would say about three months before I got rid of the cafe.

Q. Had those items been purchased new or used?

A. All but the meat grinder had been purchased new, of course, that didn't include the new icebox, the icebox was brand new.

Q. How many iceboxes were on the premises at all, altogether?

A. You mean when I got it or when I left it?

Q. When you left it.

A. There were two, two in front and then there was one in the back, what we call a reach-in.

Q. Were all those included in your sale to Mr. Humphries?

A. No, sir, I didn't own the front little box or the back big box, that belonged to Joe.

Q. Both the little box in front and the big box in back? [849]

A. That is right.

Q. So, one of the three refrigerators was included in your sale? A. That is right.

(Testimony of Clyde Graves.)

The Court: Court will stand in recess until 15 minutes past three.

(Short recess.)

The Court: Without objection the record will show all members of the Jury present.

Q. (By Mr. Cottis): Mr. Graves, I show you what has been marked Plaintiff's Exhibit 4, purporting to be a bill of sale from you to Vern Humphries and I ask you whether you have ever seen it before? A. —

Q. You may use anything you like to refresh your recollection, if you have a copy of it or anything like that you are free to use it.

A. It is all the same except this last page—the one I have.

Q. What differences are there on the last page?

A. Electric meat slicer and an electric steak cuber, one electric refrigidaire and one large electric french fryer and one meat saw.

Q. Those are items that are not included on your copy of it? A. That is right.

Q. Did any of those items go from you to Humphries on that [850] transaction?

A. Yes, the slicer and the cuber, I wouldn't want to say about the french fryer or refrigidaire.

Q. Do you recall how they came to be left out of the original bill of sale?

A. Well, we came to agreement — what he wanted to pay for it—and so when we had this

(Testimony of Clyde Graves.)

made up I said whatever is on there that is good enough for me, and I said as long as I give you a bill of sale of it you can go ahead and do what you want with it.

Q. At the time you signed it, it was not in the form of Plaintiff's Exhibit 4, is that correct?

A. That is right.

Q. Were there any other changes made since the date that you signed?

A. Only Kenneth Havin's name has been marked off.

Q. Was that marked off at the time you put your signature on it? A. No, sir.

Q. In other words, your bill of sale ran to Humphries and to Kenneth Havins instead of just to Humphries alone, as that shows?

A. That is right.

Q. And your bill of sale did not include all the items included on the attached sheet? [851]

A. That is right.

Q. Although the actual transfer did include at least two or three of them?—

A. That is right.

Q. —that have been added? Did you ever authorize anyone to make any changes in that bill of sale? A. No, I didn't.

Q. Since the time that you signed it have you seen it prior to right now?

A. No, sir, I haven't.

Mr. Cottis: Your Witness.

(Testimony of Clyde Graves.)

Cross-Examination

By Mr. McCutcheon:

Q. Turn to page 2 of that bill of sale, Mr. Graves, is that the page with the list of equipment on it that was conveyed? A. That is right.

Q. And the list that you say was not on the original is written to one side of the right hand on a different typewriter, apparently, is that right?

A. I wouldn't say a different typewriter.

Q. Isn't it blacker than the other?

A. That is right.

Q. Isn't it a different style type?

A. I would say that.

Mr. McCutcheon: No further questions. [852]

The Court: That is all.

Mr. Cottis: No further questions unless the jury wants to inquire?

The Court: Has the jury any questions?

(No response.)

The Court: That is all, Mr. Graves, another witness may be called.

Mr. Cottis: Your Honor, I want to offer in evidence at this time Exhibit——

The Clerk: Marked for identification *Plaintiff's* Exhibit M.

Mr. Cottis: Would the Court care to see it; I intend to offer it in evidence just as it is since it is in the files in this action.

Mr. McCutcheon: Objected to, Your Honor, on the grounds that the proper foundation hasn't been laid for the introduction of such a matter.

The Court: May I see the file again. Objection is overruled and the exhibit may be admitted in evidence as Defendant's Exhibit M and may be read to the jury.

Mr. Cottis: And may it be withdrawn from its proper place in the file and admitted?

Mr. McCutcheon: Stipulate that the reading may be waived.

Mr. Cottis:

DEFENDANT'S EXHIBIT M

"United States of America,

"Territory of Alaska,

"Third Judicial Division—ss.

"I, the undersigned, United States Commissioner for the Anchorage Precinct, Third Judicial Division, Territory of Alaska, do hereby certify that the hereto attached is a full, true and correct copy of the Complaint and Judgment, United States of America vs. Vernon L. Humphries, Criminal Case #6325 on file and of record in my office.

"In testimony whereof, I have hereto subscribed my name and affixed my official seal at Anchorage, Alaska, this 17th day of May, 1948.

"/s/ ROSE WALSH,

"United States Commissioner and Recorder, Anchorage Precinct."

“In The United States Commissioner’s Court

“For The Territory Of Alaska

Third Division, Anchorage, Precinct at Anchorage.

No. 6325

“UNITED STATES OF AMERICA

vs.

“VERNON L. HUMPHRIES

COMPLAINT

For Violation of Section 7 Alaska Game Laws.

“Vernon L. Humphries is accused by Holger S. Larsen in this complaint of the crime of violation of game laws committed as follows, to wit:

“The said Vernon L. Humphries in the Territory of Alaska, and within the jurisdiction of this Court, did wilfully and unlawfully, [854]on the 12th day of April, 1948 in Anchorage, Alaska, in the back of the Panhandle Cafe did have in his possession moose meat illegally taken, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

“/s/ HOLGER S. LARSEN

“United States of America
Territory of Alaska—ss.

“I Holger S. Larsen, being first duly sworn, depose and say that the foregoing complaint is true.

“/s/ HOLGER S. LARSEN

“Subscribed and sworn to before me this 13th day of April, 1948.

[Seal] /s/ ROSE WALSH,

“Commissioner and ex-officio Justice of the Peace at Anchorage, Alaska.”

“In The Justice’s Court

“for the Precinct of Anchorage, District of Alaska,

“Third Division.

“United States Of America

“Vernon L. Humphries—ss.

No. 6325

Certified Copy of Judgment

“On the 13th day of April, 1948, the above named Vernon L. Humphries, having been brought before me, Rose Walsh, a [855] Commissioner and ex-officio Justice of the Peace, in a criminal action, for the crime of violation of section 7 Alaska Game Laws, and the said Vernon L. Humphries having thereupon pleaded guilty through his attorney, Stanley J. McCutcheon, ‘—Guilty,’ and having been duly tried by Court and upon such plea duly convicted, I have adjudged that he pay a fine of Two Hundred Fifty and no/100 Dollars, and that he pay the costs of the action taxed at..... Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding.....days.

[Seal.] /s/ ROSE WALSH

“Commissioner and Ex-Officio Justice of the peace.

“United States of America

“Territory of Alaska—ss.

“I, Rose Walsh, Commissioner and ex-officio Justice of the Peace; hereby certify the foregoing to be a full, true and correct Copy of the Judgment entered in the above entitled action.

“In witness whereof: I have hereunto set my hand and affixed the seal of said court at Anchorage, Alaska, this 17th day of May, 1948.

“[Seal] /s/ ROSE WALSH,
“Commissioner and Ex-Officio Justice of the
Peace.”

Mr. Cottis: Your Honor, may I recall for two questions of cross examination, Mr. Humphries regarding a proposed exhibit that I would like to put in evidence which did not come into my possession until after the adjournment of the last Court session prior to today.

Mr. McCutcheon: May I be heard, sir?

The Court: Yes.

Mr. McCutcheon: Counsel has had two cracks at cross examination of Mr. Humphries and now he wants a third. I submit, Sir, that that would be unfair regardless of what has turned up for him to be privileged of calling Mr. Humphries back to the stand for the purpose of cross examination. I protest.

Mr. Cottis: I have only cross-examined him once and I called him as my own witness the other time.

Mr. McCutcheon: Your Honor——

The Court: That is virtually a cross examination. The objection will be overruled and the plaintiff may take the stand for further examination.

The Clerk: It is marked Defendant's Exhibit N for identification.

VERN HUMPHRIES

previously called as a witness, resumed the stand and testified as follows:

Further Cross-Examination

By Mr. Cottis:

Q. Mr. Humphries, I show you Defendant's Exhibit N for identification and ask whether the person referred to therein is Vernon Humphries, yourself?

Mr. McCutcheon: I would like to see the docket before the answer, if the Court will allow me?

Mr. Cottis: It has been offered, Your Honor.

The Court: Counsel may see it.

Mr. McCutcheon: I would like to have the Court look at it before I argue an objection to the question. If the Court please, I object to the question on the grounds that it is incompetent, irrelevant, immaterial. Counsel has had ample opportunity for cross-examination when Mr. Humphries was on the stand, that would be the appropriate time to bring up the matter upon which counsel now wishes to develop into and it is highly prejudicial to the plaintiff's case and to the plaintiff's position to

(Testimony of Vern Humphries.)

permit counsel at this time to go into that question.

The Court: Does counsel have anything further?

Mr. McCutcheon: Only to say it is completely unfair for Mr. Cottis to be privileged now to inquire into that subject. Must we protect ourselves time after time against cross-examination? It seems unfair that he should be entitled to call the witness to the stand at any time he should choose for cross-examination and especially on a subject as vital as this and which should have been brought up on cross-examination in the [858] case in main when the witness was first on the stand.

Mr. Cottis: May I be heard, Your Honor?

The Court: The objection is overruled.

Q. (By Mr. Cottis): Question may be answered.

A. Yes, I signed it and I am proud of it, Mr. Cottis, that I pleaded guilty to grand larceny in the year of 1934 and I still say that it was all right and I haven't got a thing to be ashamed of or hide, sure I did nine months in a reformatory as a boy. I have a wife and three children and I tried to live it down, you like to bring it up.

The Court: Wait, just answer questions.

The Witness: I have answered it.

Mr. Cottis: No further questions, Your Honor.

The Witness: I would like to be heard more on it.

The Court: Over the objections of plaintiff's

(Testimony of Vern Humphries.)

counsel it may be admitted and may be read to the jury.

Mr. McCutcheon: I think it has been heard enough, if the Court please. I have no cross-examination.

The Court: That is all, sir.

Juror: Is it permissible to ask a question about something from the past?

The Court: Yes. The exhibit which you will receive presently shows the conviction of the defendant—plaintiff, rather, Vern Humphries, of an offense I think in the year 1934. [859]

Juror: I wanted to ask him this question—

The Court: Don't answer until I have a chance to rule.

Juror: Can you write your name with both hands?

The Witness: No, Ma'am.

Juror: I was going to ask if he could to give us a sample of his name in both hands?

The Court: Do you wish to give the juror a sample of your handwriting?

The Witness: Yes, I would.

The Court: All right, Clerk will supply a piece of paper. Your name at the top is written by you with which hand?

The Witness: With the left hand.

The Court: Will you mark the word "left" or "L" and the one below which is written with the right hand mark that "right." That paper will be

(Testimony of Vern Humphries.)
admitted in evidence and marked Exhibit No. 101.
It will not be attributed to either *plaint* or de-
fendants. Mark this 101.

The Clerk: Yes, sir.

The Court: It may go to the jury. Do counsel
wish to read the last exhibit?

Mr. Cottis: Yes, Your Honor.

“In the Superior Court of the State of Washington
in and for the County of Yakima.

“No. 4329

“THE STATE OF WASHINGTON,

“Plaintiff.

“vs.

“VERNON HUMPHRIES,

“Defendant.

“Judgment and Sentence”

“This case coming on before the court, in open
court, on this 3rd day of November, 1934, The State
of Washington being represented by the Prose-
cuting Attorney of Yakima County, and said de-
fendant Vernon Humphries, appearing in person
without counsel, defendant having waived counsel
in open court and the plaintiff having moved for
judgment and sentence of the court herein upon
said defendant, said defendant is informed by the
court of the nature of the information filed against
him charging him with having committed the crime

(Testimony of Vern Humphries.)

of Grand Larceny on count 1 and Burglary in the Second Degree on count 2 on or about the 19th day of October, 1934, of defendant's arraignment and plea of Guilty of the offense charged in said information upon each count.

"Whereupon, said defendant is asked by the court if he has any legal cause to show why Judgment should not be pronounced against him to which he replies that he has none that he has not already shown; and no sufficient cause being shown or appearing otherwise to the court, thereupon the Court renders its Judgment:

"That, whereas, said defendant has been duly convicted in this court on the 3rd day of November, A. D., 1934, of the crime of Grand Larceny on count 1 and Burglary in the Second Degree on count 2, it is therefore Ordered, Adjudged and Decreed that said defendant, Vernon Humphries is guilty of the crime of Grand Larceny on count 1 and Burglary in the Second Degree on [861] count 2 and that he be punished by confinement at hard labor in the Reformatory of the State of Washington for a period of not less than Nine Months nor more than Fifteen Years upon each of said counts, said sentences to run concurrently, and to pay the costs of this prosecution as the same may be hereafter taxed, said defendant Vernon Humphries is hereby remanded to the custody of the Sheriff of said County to be by him detained and delivered into the custody of the proper officers for transpor-

(Testimony of Vern Humphries.)

tation to the said Reformatory of the State of Washington, at Monroe, Washington.

“Done and signed by the Court in open Court, in the presence of defendant, on this 3rd day of November, 1934.

“DOLPH BARNETT,

“Judge.

“The State of Washington,

“County of Yakima—ss.

“I, Jasper W. Day, County Clerk and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Yakima, do hereby certify the foregoing to be full, true and correct copy of the Judgment and Sentence duly rendered and made, by the Hon. Dolph Barnett, Judge of said Court, on the 3rd day of November, A. D., 1934, and now of record in my said office in the above entitled action.

“Attest my hand and the seal of the said Superior Court this 30th day of June, A. D., 1949.

“By /s/ RUBY S. JOHNSON,

“Deputy.

“[Seal] JASPER W. DAY,

“Clerk.”

The Witness: May I ask Mr. Cottis a question?

The Court: No.

(Testimony of Vern Humphries.)

Further Redirect-Examination

By Mr. McCutcheon:

Q. Do you care to say how old you are?

A. I was born in 1910.

Mr. Cottis: The defense rests, Your Honor.

The Court: The plaintiffs may call a witness in rebuttal.

Mr. McCutcheon: May we have a brief recess, Sir?

The Court: We will take the hourly recess now and we can go on through. Has counsel any idea how long it will take us to conclude the testimony or does counsel care to make any estimate?

Mr. McCutcheon: I doubt if we will put on any rebuttal.

The Court: Court will stand in recess for ten minutes.

(Short recess.)

The Court: Is there any rebuttal testimony?

Mr. McCutcheon: No, Your Honor.

The Court: Without objection the record will show all members of the jury present.

The Court: Next thing in order is instructions to the jury. I note here that counsel for defendant has just handed to me some eight instructions which, of course, I have not had time to read. None of them can be considered before giving the instructions. If counsel wish instructions to be considered [863] they ought to give them to the Court in time so that they could at least be read.

In the District Court for the Territory of Alaska
Third Division

No. A-4979

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Plaintiffs.

vs.

LAURENCE STARNS, JOE BLACKARD and
GLEN PHILLIPS,

Defendants.

which was filed on May 8, 1948.

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury: You are in-
structed as follows:

I (Page 1)

This case is a civil case in which Vern Humphries and Marvin Campbell are plaintiffs and Laurence Starns, Joe Blackard and Glen Phillips are defendants.

In their amended complaint, which was filed on May 8, 1948, the plaintiffs allege that they are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service and that said business was located in the premises described as the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the City of Anchorage, Alaska; that defendants hold a leasehold right in said premises by virtue of a lease from Anna K. [864]

Campbell, the owner of the premises, to the defendants; that on or about the 4th day of February 1948, at Anchorage, Alaska, the defendant Blackard entered into a written lease agreement with plaintiff, Humphries, a copy of which, as plaintiffs assert in their amended complaint, being attached thereto, whereby defendant, Blackard, agreed to lease to plaintiff, Humphries, for the period of one year, space in said premises adequate for the operation of a restaurant business and whereby defendant, Blackard, further agreed to furnish space, light, heat and water necessary for such operation and to provide the utensils and equipment for such operation; that it was further agreed by the terms of said agreement that the plaintiff would pay to defendant as rental for said premises six per cent of the gross receipts derived from all operations of said restaurant business or the sum of \$200.00, per month which ever might be the greater; that pursuant to an offer by defendant Blackard and accepted by Plaintiff Humphries, said agreement of lease was entered into, duly signed by both parties and possession of said restaurant premises delivered to plaintiff, Humphries, from defendant in accordance with the terms of said agreement; that relying on said agreement plaintiff expended large sums of money in the construction of a counter upon said premises and expended further sums of money for modern fixtures and equipment necessary for said restaurant business including ranges, stools and other necessary fix-

tures and equipment; [865] that said counter and equipment was located in the southwest portion of said Panhandle premises and was there so located at the direction of the defendants; that plaintiffs at the time of filing said amended complaint were entitled to the possession of said restaurant premises in accordance with the agreement mentioned; that plaintiff performed all of the things and conditions required by said agreement to be performed by the lessee; that plaintiff commenced the operation of said restaurant business on or about March 6, 1948, and that after the commencing of said business, defendants maliciously, wilfully and wantonly interfered with plaintiffs' business resulting in great loss of profits to plaintiff; that on or about April 20, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and failed and refused to permit plaintiff the use thereof; that defendants refused and neglected to provide plaintiffs with light, heat and water for said restaurant business as required by said agreement, to plaintiffs' damage in the sum of \$575.00; that defendants maliciously, wilfully and unlawfully operated and conducted gambling games, interfering with and otherwise being detrimental to plaintiffs' business, whereby plaintiffs' business was damaged; that defendants wilfully and maliciously injured plaintiffs' credit rating much to plaintiffs' damage; that on or about May 5, 1948, the defendants did with deliberate intent to injure plaintiff, maliciously, wilfully and wantonly prohibit

the [866] delivery of fuel oil to plaintiff whereby plaintiffs sustained damage; that on or about May 5, 1948, at the hour of 1:30 o'clock in the morning of said day the defendants took possession of plaintiffs' restaurant premises, shut off the cook range, locked the premises and announced to plaintiffs' customers that the premises were permanently closed and plaintiffs were no longer to have possession thereof, thereby seriously injuring plaintiffs' business; that defendants threatened plaintiff with physical violence should plaintiff attempt to continue operating their restaurant business; that because of the acts of defendants, plaintiffs have been damaged in the sum of \$10,575.00.

The plaintiffs asked for judgment against the defendants in the sum of \$10,575.00 in actual damages and in the additional sum of \$10,000.00 in exemplary damages.

It appears from the undisputed testimony that since this action was brought the premises in question has been destroyed by fire. Accordingly the prayer of the plaintiffs' amended complaint that the defendants be restrained and enjoined from interfering with plaintiffs' business cannot be granted and this action is now resolved into an action to determine whether or not the plaintiffs are entitled to recover any damages from the defendants by reason of the evidence given in support of the plaintiffs' amended complaint.

To the plaintiffs' amended complaint, the defendants [867] on June 15, 1949, filed an answer

admitting the allegations of Paragraphs 1 and 2 of the amended complaint and denying all other averments contained in the amended complaint. You will observe that Paragraphs 1 and 2 of the amended complaint allege that plaintiffs are co-partners engaged in the restaurant business under the firm name and style of Alaska Food Service, and that the business at the time of the filing of the amended complaint was located in the Panhandle Bar and Cafe, at 314 Fourth Avenue, in the City of Anchorage, Alaska, and that the defendants held a lease-hold right in said premises by virtue of a lease from the owners, Anna K. Campbell, to the defendants. It is, therefore, obvious that the defendants have denied all of the averments which in any manner allege that the plaintiffs have been damaged by any acts or omissions of the defendants. The foregoing constitutes a condensed statement of what the respective parties assert in their pleadings in this case. When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case consisting of plaintiffs' amended complaint and the defendants' answer thereto so that you may there read and consider of said pleadings and determine the precise nature of the respective claims of the plaintiffs and of the defendants as stated in their pleadings.

I-A

In their amended complaint, the plaintiffs state that [868] a copy of the alleged lease is attached to and made a part of the amended complaint, but

the plaintiff, Humphries, in his testimony stated, in substance, that the written agreement on which the plaintiffs rely differs in some respects from the agreement of which a copy is attached to the plaintiffs' amended complaint, and that the agreement finally entered into between the parties is the one of which a copy is attached to the amended complaint in cause No. A-5001, introduced in evidence during the trial and marked plaintiffs' Exhibit No. 3. Plaintiff, Humphries, in his testimony also asserted that the final written agreement entered into between the parties was thereafter modified by oral agreement or agreements, concerning the furnishing of a bond and otherwise.

Nothing in the law prevents or forbids the change, alteration or modification by oral agreement of such a written agreement as that relied upon here by either the plaintiff or the defendant.

It is for you to determine from all of the evidence what agreements, oral or written, or both, were entered into between plaintiffs and defendants.

III.

In this case, as in all civil cases, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence only; and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. [869] If the evidence in your mind is equally balanced as between the plaintiffs and defendants then the verdict should be for the de-

defendants because the burden is upon the plaintiffs to present evidence of greater weight than that in favor of the defendants before plaintiffs are entitled to recover.

IV.

As you know, three persons have been named as defendants in this action, Laurence Starns, Joe Blackard and Glen Phillips. It is for you to determine whether any or some or all of the defendants or defendant Blackard only, are liable to respond in damages to the plaintiffs in this action. This is not to suggest that any of the defendants is so liable, because that is a matter for your decision and determination. However, it appears by undisputed testimony that neither the defendant, Starns, nor the defendant, Phillips, signed any written agreement between the parties and that any such written agreement was signed by the defendant, Blackard, only, of the three defendants named. It is thus within your province to find for the plaintiffs and against the defendant, Blackard, or the defendant, Blackard, and either or both of the defendants, Starns and Phillips, or to find in favor of all of the defendants and against the plaintiffs.

If you find that the plaintiffs have proved the material averments of their complaint by a preponderance of the evidence, [870] and thus that the plaintiffs are entitled to recover, you should return a verdict accordingly in favor of the plaintiffs and against all of the defendants, or against the defendant, Blackard, and either or both of the other

defendants, Starns and Phillips, the verdict being confined to such damages as represents the actual loss sustained by the plaintiffs by reason of the wrongful acts of the defendants, or such of them as you find liable for the damages sustained by the plaintiffs. But unless you find that the plaintiffs have so proved their case by a preponderance of the evidence, then you should return a verdict in favor of the defendants and against the plaintiffs.

V.

If you find in favor of the plaintiffs and against the defendants, or any of them, your verdict must be founded upon the evidence admitted in the trial and the inferences naturally and reasonably to be drawn therefrom, and upon the law as contained in these instructions. Verdicts for damages in all cases must be such as are based upon the evidence, and are fully supported by the evidence, and not upon speculation, conjecture or surmise; and in this case only such damages, if any, should be awarded to plaintiffs as may be reasonably ascertained.

VI.

Plaintiffs claim that they were damaged by the maintenance of gaming by cards by defendants, or one or some of them, in the place of business of which the plaintiffs occupied a part [871] for restaurant purposes. The fact that the defendants, or one or more of them may have violated the law will not justify you in returning a verdict against

said defendants or either of them, unless you further find that the plaintiffs were injured by the maintenance and carrying on of such gaming operations. Moreover if the plaintiffs, or either of them, knew in advance before the written contract was entered into that such gaming operations were to be carried on by the defendants, or one or more of them, then the plaintiffs are estopped to claim any damages by reason of such gaming.

VII.

The jury is instructed that they should bring to bear upon the consideration of the evidence or lack of evidence in this case all of the common knowledge of men and affairs which they, as reasonable human beings, have and exercise in every-day affairs of life. Accordingly, you should draw from the evidence or lack of evidence in this case all deductions which appear to you to flow logically from the evidence or lack of evidence. Whatever verdict is warranted by the evidence under the instructions of the Court, you should return as you have sworn to do.

VII-A

Evidence has been admitted for the purpose of showing previous conviction of crime of the plaintiff, Vernon Humphries. That evidence was admitted only because it may, [872] in your judgment, possibly affect or have bearing upon the credit of said plaintiff as a witness, and for no other purpose whatever. Whether the credibility of the plaintiff,

Humphries as a witness, is or is not affected by such evidence of previous conviction of crime is for you to determine. With respect to this evidence as with all other evidence you are subject to the limitations of these instructions, the sole judges of its weight and value.

VIII.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court. [873]

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account

the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

IX.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not product conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds. [874]

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own

intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

X.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

XI.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are [875] not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But ar-

guments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

XII.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the [876] views and opinions of other jurors.

XIII.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the conclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

XIV

Upon retiring to the jury room to consider your verdict, you will elect one of your number foreman, who will speak for you and date and sign the verdict unanimously agreed upon. When you retire you will take with you to the jury room the pleadings in the case, consisting of the plaintiffs' amended complaint and the defendants' answer thereto, the exhibits, these instructions and two forms of verdict.

If you find for the plaintiffs and against the defendants or any of them, you should use the form of verdict which has [877] been prepared for that contingency and your foreman will insert therein the amount which you find the plaintiffs are entitled to recover and also insert therein the names of the defendants, one or more or all of them, from whom you find the plaintiffs are entitled to so recover. The verdict should then be dated and signed

by your foreman and returned into Court as your verdict.

If you find for the defendants and against the plaintiffs, you should use the verdict which has been prepared for that contingency and your foreman should date and sign the same and return the same into Court as your verdict.

The verdict not used should be destroyed by your foreman.

With your verdict you will return into Court the pleadings, the exhibits and these instructions.

Dated at Anchorage, Alaska, this 5th day of July, 1949, and I have signed it as District Judge.

The Court: Instructions having been read to the jury counsel may now come to the bench. Counsel for plaintiffs may take exceptions.

Mr. McCutcheon: No exceptions.

The Court: Counsel for defendants may except.

Mr. Cottis: Your Honor, I ask for an instruction as to Blackard's right to terminate that contract by its very terms.

The Court: Well, if you handed it up, Mr. Cottis, just [878] as I started to read the instruction——

Mr. Cottis: I realize that, Your Honor, but I expected rebuttal testimony and the girls didn't fetch it along.

The Court: I will consider the proposed instructions and if I think justice would be denied by failure to give the instruction I will give it, however, you can take the exception.

Mr. Cottis: In that respect may I elaborate?

The Court: Certainly, it may be highly necessary.

Mr. Cottis: The agreement between the plaintiff and the defendant has been referred to repeatedly both in the complaint and in testimony and by Mr. McCutcheon as a lease, we are all familiar with OPA regulations or know that there are such things and eviction difficulties and I feel that without no instruction they might think that that 24-hour right of termination is invalid and have peculiar notions of what the law is and feel that it is wrong of Blackard to serve a termination notice effective on 24 hours, so I would like an instruction to the effect that that was a matter of proper agreement between the proper parties that the undisputed testimony is that that notice was served and that the plaintiffs after the 24 hours had expired were trespassers on the premises and that in order to entitle the plaintiffs to damages for any of these alleged wrongdoings the jury must find that they occurred after April 16th.

The Court: After what? [879]

Mr. Cottis: Prior to April 16th.

I request that an instruction be included, because of the wealth of testimony in here, to the effect that there is nothing in the complaint about failure to reimburse the plaintiffs for inventory of stock at the time that the contract was terminated and therefore the jury cannot base any damages on any inventory of merchandise that Humphries might have left in the restaurant.

Your Honor, because of the complaint asking for punitive damages, it is my recollection that the Court sometimes gives an instruction on what the jury could properly base punitive damages.

The Court: That was overlooked, I shall include it. I should have thought of it before and didn't—it escaped me.

Mr. Cottis: And I request an instruction that there has been no showing of loss of profits on the part of the plaintiffs sufficient for the jury to consider.

I request an instruction that the jury disregard all testimony regarding moose meat; that it is a collateral to the judgment and a judgment cannot be attacked collaterally. It was offered before plaintiffs' rebuttal testimony and therefore the judgment was not in evidence at that time, that is, all that testimony regarding moose meat and who was there and the Marshal and so forth is a collateral part and the judgment that is put in evidence was after that and I asked that the jury [880] be instructed to disregard all testimony regarding Humphries' purchase of equipment because the Court permitted that testimony to go in originally subject to a motion to strike it at any time if it was not connected up and I urge that it has not been connected up with the complaint in any respect.

I have no exceptions to the form of instructions here, however.

The Court: All of the exceptions will be noted as of course.

Do you gentlemen care to state how much time you want to argue the case? The reason I ask I may be able to call the jury tomorrow afternoon to start the next case; do you want to do that?

Mr. McCutcheon: What is the next case?

The Court: It is your case. Counsel for plaintiffs may make opening argument to the jury.

Mr. McCutcheon: If the Court please, Mr. Cottis, Ladies and Gentlemen of the Jury. I am not going to take your time in final argument, but only wish to thank you for your patience and diligence during the course of this trial. It has been a long, hard, hot case and I know that it must have taxed your patience a great deal and for that I thank you.

The Court: Counsel for defendants may proceed.

Mr. Cottis: May I inquire, was that plaintiffs' opening argument? [881]

Mr. McCutcheon: That was my opening.

Mr. Cottis: I will waive my right to argue, then.

The Court: The case will go to the jury. There is one more instruction I must give and it will be an instruction concerning exemplary damages. I regret to say that I overlooked it and it is necessary or advisable at least that you should have it.

The Court will presently stand in recess, I am wondering if counsel will agree to a sealed verdict?

Mr. McCutcheon: Yes, Your Honor.

Mr. Cottis: Yes, Your Honor.

The Court: I wish in view of this development

that the Clerk would have somebody in the Clerk's office try to get in touch with the jurors who are excused and have them report tomorrow morning at ten o'clock.

Court will stand in recess for ten minutes.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Ladies and Gentlemen of the Jury, the plaintiffs in their complaint ask for both compensatory damages, ordinary damages as they are sometimes called, and punitive or exemplary damages, and therefore upon suggestion of counsel it is necessary to give you an instruction upon the law concerning punitive damages. It was omitted in the first place simply through oversight. [882] This instruction is neither less important or more important than the other instructions because it happens to come in last. It is just one of the instructions. It is numbered 5-A, and will be inserted accordingly in the instructions.

5-A

Damages are of two kinds, compensatory and punitive. Compensatory damages mean what the name indicate, compensation for damages sustained.

The plaintiffs in this case have asked for both compensatory and punitive damages, the latter being sometimes called exemplary damages. Punitive damages may not be awarded in any case unless the

jury finds that the plaintiffs are entitled to compensatory damages in some amount.

If you find in this case that the plaintiffs are entitled to recover damages from the defendants or any of them then you may consider whether you ought to allow recovery also of punitive damages. Under the law, punitive damages are damages that are given by way of punishment, sometimes in the nature of a fine in a criminal case, except that in a civil action such as this, any amount awarded as punitive damages is paid to the plaintiffs.

To justify an award of punitive damages you must find that the defendant or defendants against whom the punitive damages are assessed acted with actual malice in some of the material respects set out in plaintiffs' amended complaint. [883] Actual malice implies ill will and it may be proven directly or indirectly, that is to say by direct evidence of evil motive and intent, or by legitimate inference to be drawn from other facts and circumstances in evidence. It is for you to say whether under all of the evidence in this case, actual malice on the part of any of the defendants toward the plaintiffs or either of them has been shown. Actual malice manifested by one of the defendants would not justify you in returning a verdict for punitive damages against any other of the defendants. The granting or withholding of an award of punitive damages is entirely within your discretion, even upon the clearest proof of actual malice.

The Court: Does counsel desire to take excep-

tions from this instruction? They may come to the bench.

Mr. Cottis: No exception.

Mr. McCutcheon: No exception.

The Court: This will be added. Now the verdicts have not been prepared but they will be sent up to you by the Bailiffs later, and quite soon, and counsel will be supplied with copies. The forms of verdict will be as usual.

The jury may note that none of the pages in these instructions is numbered 2. That was omitted in order to fit in another instruction and finally the instruction was not included.

Bailiffs may be sworn. [884]

(Oath administered by Clerk.)

The Court: Perhaps I had better ask counsel whether they have any objections to my sending forms of verdict to the jury after they retire by the Bailiff?

Mr. McCutcheon: Plaintiff has no objection.

Mr. Cottis: I have none, Your Honor, and might I suggest that the sealed verdict provisions go into effect at six or must they go into effect at five?

The Court: I think we may as well, it is very close to five o'clock. I think the sealed verdict, if it is agreeable to counsel the sealed verdict provisions can go into effect now. If counsel do not wish it that way the Court will do whatever counsel desire in that respect, because counsel aren't obliged to consent to any sealed verdict.

Mr. Cottis: I have no objection, Your Honor, I merely wanted to make a suggestion.

The Court: The sealed verdict provision will go into effect now.

Ladies and Gentlemen of the Jury, I think you are familiar with procedure which is known as returning a sealed verdict and with the other papers you will be given an envelope containing this endorsement: First the title of the cause and then the words "Sealed Verdict" and then "Ladies and Gentlemen of the Jury: If you have not reached a verdict by five P. M. o'clock, today, then when you have agreed upon a verdict, have [885] the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All the jurymen must be in the jury box in court at 10 o'clock A. M. of Wednesday, July 6th, 1949, at which time the verdict will be handed to the Court and opened in the presence of the jury.

"Dated at Anchorage, Alaska, this 5th day of July, 1949.

"I have signed it as District Judge. It has been signed approved by attorneys for the parties."

This is a procedure which permits you immediately to separate and go to your homes when you have arrived at a verdict and you need not await the coming in of the Judge and counsel and Clerk.

That envelope will go with the other papers when you retire, and the two forms of verdict—one of

which can be used by you according to your decisions—will be sent up to you and handed to you by the Bailiff later. They are not now prepared.

Ladies and Gentlemen of the Jury you may now retire to consider of your verdict.

(Whereupon, at 4:50 p. m., July 5, 1949, the case was closed.) [886]

United States of America
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the District Court of the United States, Territory of Alaska, Third Division, hereby certify the above and foregoing 886 pages to be a true and correct transcript of the proceedings had of the testimony in the above entitled matter in said Court at the times and places as set forth.

Dated: January 19, 1950.

/s/ OREN J. CASEY

Certified Shorthand Reporter

[Endorsed]: Filed January 28, 1950.

CERTIFICATE

I, M. E. S. Brunelle, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify the enclosed file is a complete file of all original papers, except the Supersedeas Bond, as docketed in the records of this Court, in the cause number A-4979, entitled Vern Humphries and Marvin Campbell, Plaintiffs, vs. Laurence Starns, Joe Blackard and Glen Phillips, Defendants.

/s/ M. E. S. BRUNELLE,
Clerk of the District Court

[Endorsed]: Filed March 20, 1950.

[Endorsed]: No. 12503. United States Court of Appeals for the Ninth Circuit. Laurence Starns, Appellant, vs. Vern Humphries and Marvin Campbell, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed March 17, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12503

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

1. The Court erred in refusing to make findings of fact and conclusions of law.

2. The Court erred in refusing to charge the jury appellant's requested instructions Nos. 1, 2, 3, 7 and 8.

3. The Court erred in refusing to grant appellant's "Motion to Reject Verdict of Jury and for Alternative Relief."

4. The Court erred in failing to frame specific issues for the jury's consideration.

5. The Court erred in permitting the inclusion of punitive damages in the judgment.

6. The Court erred in permitting testimony of the circumstances regarding the conviction of one of the plaintiffs for having possession of illegal moose meat.

7. The Court erred in permitting testimony regarding fire insurance policies.

8. The Court erred in admitting in evidence testimony regarding the cost of restaurant equipment.

9. The Court erred in directing counsel for the defendants in the presence of the jury to produce a document allegedly drawn by plaintiff's attorney when there was no evidence that defendant's counsel had ever seen it or had it in his possession.

10. The Court erred in permitting the plaintiff Humphries to testify regarding his alleged service in putting up wall paper since this was not a part of the complaint.

11. The Court erred in permitting testimony regarding the inventory of stock left on the premises by the plaintiffs, since the purported cause of action had nothing to do with such an inventory.

12. The Court erred in permitting testimony about a supplemental contract claimed by the plaintiff Humphries to have been made orally, under which the defendant Starns was to pay plaintiffs' construction costs, for this claim was not included in the amended complaint.

13. The Court erred in permitting plaintiffs' attorney to link with the defendants the names of persons having wide local repute as gamblers.

14. The Court erred in permitting plaintiffs' attorney in cross-examination of the defendant Starns to infer without justification that the defendant Starns had an illegal agreement with the defendant Blackard since this was no part of the alleged cause of action and did not bear on the direct testimony.

15. The Court erred in permitting evidence regarding loss of business from five additional seats in the restaurant counter had the Starns liquor store been located elsewhere since no such claim was a part of the plaintiff's cause of action.

16. The Court erred in allowing \$255.00 in plaintiffs' cost bill as mileage for Mr. Humphries and the same sum as mileage for Mr. Campbell.

Dated at Anchorage, Alaska, this 24th day of March, 1950.

/s/ RALPH H. COTTIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 27, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD
MATERIAL TO CONSIDERATION OF AP-
PEAL

1. Amended complaint.
2. Answer verified 24 May, 1948, and filed June 15, 1949.
3. Verdict.
4. Motion to reject verdict of jury and for alternative relief.
5. Judgment.
6. Motion for findings of fact.

7. Hearings on motion to require findings of fact entered in journal G20, page 173, November 18, 1949.

8. Notice of appeal.

9. Order granting extension.

10. Opinion dated 30 December, 1949.

11. Second amended cost bill.

12. Objections to second amended cost bill.

13. Second amended cost bill; objections thereto; and order rendered 24 February, 1950.

14. Order of court rendered 2-18-49.

15. Transcript of testimony.

16. Defendants' requested instructions numbered 1, 2, 3, 7 and 8.

17. Original copies of plaintiff's exhibits 1, 2, 3 and 22; defendants' exhibits J, K, L, M.

Dated at Anchorage, Alaska, this 24th day of March, 1950.

/s/ RALPH H. COTTIS.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 27, 1950.

No. 12503

United States
Court of Appeals
for the Ninth Circuit.

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

SUPPLEMENTAL
Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Third Division

FILED

SEP 8 - 1950

PAUL P. O'BRIEN,

CLERK

No. 12503

United States
Court of Appeals
for the Ninth Circuit.

LAURENCE STARNS,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
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Appellees.

SUPPLEMENTAL
Transcript of Record

Appeal from the District Court
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Third Division

United States Court of Appeals for the
Ninth Circuit

No. 12503

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMP-
BELL,

Appellees.

STIPULATION

Ralph H. Cottis, of attorneys for the above-named appellant, and Stanley McCutcheon, of attorneys for the above-named appellees, hereby stipulate that the attached defendant's requested instructions Nos. 1, 2, 3, 7, and 8 which were omitted from the printed transcript of record may be printed and added as a part of said record.

This stipulation is made pursuant to rule 75(h) of the Federal Rules of Civil Procedure at Anchorage, Alaska, on July 28, 1950.

/s/ RALPH H. COTTIS,

For Hellenthal, Hellenthal & Cottis, Attorneys for
Appellant.

/s/ STANLEY McCUTCHEON,

Attorney for Appellees.

In the District Court for the Territory of Alaska,
Third Division

No. A-4979

VERN HUMPHRIES and MARVIN
CAMPBELL,

Plaintiffs,

vs.

JOE BLACKARD, LARRY STARNs, and
GLEN PHILLIPS,

Defendants.

INSTRUCTIONS REQUESTED BY THE
DEFENDANTS

Defendants' Requested Instruction No. 1

You are instructed that under any version of the purported agreement between Joseph Blackard and Vern Humphries and Kenneth Havens (Plaintiffs' Exhibits 1, 2, and 3), Blackard was entitled to terminate the relationship with Humphries upon service of a written notice 24 hours in advance of such termination. The contract does not require that grounds for the termination be set forth in such notice. If you find, therefore, that the actions described in paragraphs XI, XII, XIII, XIV, XVI occurred after the 16th of April, then you must find for the defendants even if such actions did occur.

Defendants' Requested Instruction No. 2

You are instructed that the plaintiffs' were trespassers upon the Panhandle premises after some hour on the 16th day of April, 1948, and that they are therefore not entitled to recover any damages for actions by the defendants which occurred on the premises after that date.

Defendants' Requested Instruction No. 3

You are instructed that the plaintiffs have not produced sufficient evidence to justify you in arriving at any verdict against the defendant Laurence Starns.

Defendants' Requested Instruction No. 7

You are instructed that by all the testimony the plaintiffs failed to perform the obligations required to be performed by them under the agreement of February 4, 1948, and that plaintiffs therefore are entitled to no damages even if the defendants failed to abide by said contract.

Defendants' Requested Instruction No. 8

You are instructed that the amended complaint in this action does not ask any damages for loss of equipment or inventories of consumable supplies belonging to plaintiffs and that the plaintiffs are therefore not entitled to recover for such items.

[Endorsed]: Filed August 2, 1950.

No. 12,503

IN THE

United States Court of Appeals
For the Ninth Circuit

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMPBELL,

Appellees.

BRIEF FOR APPELLANT.

RALPH H. COTTIS,

JOHN S. HELLENTHAL,

HELLENTHAL, HELLENTHAL

& COTTIS,

Post Office Box 941, Reed Building, Anchorage, Alaska.

Attorneys for Appellant.

FILED

OCT 23 1950

PAUL P. O'BRIEN,
CLERK

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No. 12,503

IN THE
United States Court of Appeals
For the Ninth Circuit

LAURENCE STARNES,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMPBELL,

Appellees.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon 48
USCA 101:

“Sec. 101. District court: judges; divisions. There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes;”

Jurisdiction of the Court of Appeals for the Ninth Circuit is based upon 28 USCA 1291:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska.”

and upon 28 USCA 1294:

“Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

* * * * *

(2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit.”

STATEMENT OF THE CASE.

The defendants Blackard and Starns obtained an assignment of a lease of real property in Anchorage, Alaska. They held the lease “as tenants in common, and not as joint tenants” (page 463, Plaintiffs’ Exhibit 18). Starns built a retail package liquor store on one corner of the premises and Blackard installed a bar and restaurant on the remainder of the premises. The two enterprises were separate, both physically and financially (“no person or persons other than the licensee shall have any direct or indirect financial interest in the business for which the license is issued”, 35-4-16D, ACLA 1949; “provided, however, that the premises for which such license is issued shall not be connected by doors or otherwise with premises covered by any other license issued under these regulations”, 35-4-21A, ACLA 1949).

Starns had lent Blackard ten thousand dollars and had a chattel mortgage on Blackard’s restaurant and bar equipment, but they were not partners at any time (TR. 748, 749, 814). Blackard granted the restaurant concession to the plaintiffs by an agreement

which gave him a right of termination upon twenty-four hours notice (Plaintiffs' Exhibits 1, 2 and 3). On April 15, 1948, he had the U. S. Marshal's Office serve such a notice (Defendants' Exhibit A, TR. 160).

Three weeks later, plaintiffs filed their amended complaint (referred to herein as the "complaint") charging the defendants had interfered with their rights of occupancy and with their business in these respects:

(a) On April 20, 1948 they took possession of plaintiffs' storeroom;

(b) They neglected to provide light, heat and water in accordance with the agreement;

(c) They maliciously, wilfully and unlawfully conducted gambling games detrimental to plaintiffs' business;

(d) They wilfully and maliciously injured plaintiffs' credit rating;

(e) On May 5, 1948, they maliciously prohibited the delivery of fuel oil;

(f) On May 5, 1948, they took possession of the restaurant and locked the premises, announcing to plaintiffs' customers that the premises were permanently closed.

The complaint asked for an injunction, for compensatory damages, and for punitive damages.

Issue was joined by a general denial, a permissible pleading under the then prevalent practice. The Federal Rules of Civil Procedure became effective in

Alaska on July 18, 1949 (28 USCA 2072) after this case had been tried.

The affirmative defense of the termination notice served on behalf of the defendant Blackard was introduced without objection by plaintiffs (Page 72, plaintiffs' attorney: "Well, if the court please, I have no objection to the introduction of both exhibits as I have intended to introduce them myself").

The case was tried before a jury as in an action at law; no specific issues were framed. The jury found damages against the defendants Blackard and Starns, but not against the defendant Phillips, even though the latter was by all testimony a partner of Blackard, and active in the conduct of the bar and restaurant business, while Starns was neither a partner nor active in Blackard's business (TR. 332, 334, 661, 662, 663).

By the very terms of the complaint, three of the six specific causes for damages occurred after the time of service of the termination notice on April 15, 1948.

SPECIFICATIONS OF ERROR.

1. The Court erred in refusing defendants' requested instruction No. 1 as follows:

"You are instructed that under any version of the purported agreement between Joseph Blackard and Vern Humphries and Kenneth Havens (Plaintiffs' Exhibits 1, 2, and 3), Blackard was entitled to terminate the relationship with

Humphries upon service of a written notice 24 hours in advance of such termination. The contract does not require that grounds for the termination be set forth in such notice. If you find, therefore, that the actions described in paragraphs XI, XII, XIII, XIV, XVI occurred after the 16th of April, then you must find for the defendants even if such actions did occur."

The instruction was handed to the Court (TR. 844) when plaintiffs announced that there would be no rebuttal testimony. Defendants again requested such an instruction and the Court allowed an exception (TR. 859).

"The Court. I will consider the proposed instructions and if I think justice would be denied by failure to give the instruction, I will give it; however, you can take the exception."

Defendants argued (TR. 860):

"so I would like an instruction to the effect that that was a matter of proper agreement between the proper parties that the undisputed testimony is that that notice was served and that the plaintiffs after the 24 hours had expired were trespassers on the premises and that in order to entitle the plaintiffs to damages for any of these alleged wrongdoings the jury must find that they occurred after April 16th.

The Court. After what?

Mr. Cottis. Prior to April 16th."

(TR. 861):

"The Court. All of the exceptions will be noted as of course."

2. The Court erred in refusing defendants' requested instruction No. 2.

This instruction was as follows:

"You are instructed that the plaintiffs were trespassers upon the Panhandle premises after some hour on the 16th day of April, 1948, and that they are therefore not entitled to recover any damages for actions by the defendants which occurred on the premises after that date."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, *supra*.

3. The Court erred in refusing defendants' requested Instruction No. 3.

The instruction was:

"You are instructed that the plaintiffs have not produced sufficient evidence to justify you in arriving at any verdict against the defendant Laurence Starns."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, *supra*.

4. The Court erred in refusing defendants' requested Instruction No. 7.

The instruction was:

"You are instructed that by all the testimony the plaintiffs failed to perform the obligations required to be performed by them under the agreement of February 4, 1948, and that plaintiffs therefore are entitled to no damages even if the defendants failed to abide by said contract."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, *supra*.

5. The Court erred in refusing defendants' requested Instruction No. 8.

The instruction was:

"You are instructed that the amended complaint in this action does not ask any damages for loss of equipment or inventories of consumable supplies belonging to plaintiffs and that the plaintiffs are therefore not entitled to recover for such items."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, *supra*.

These arguments had been brought to the attention of the Court in connection with a motion for judgment for the defendants. Counsel for the defendants stated in part:

"And either version of the contract has in it a provision that Blackard can terminate the contract by written notice delivered 24 hours in advance of the effective date of termination. Now there is no denial by the plaintiff and there is no dispute that such a notice was delivered.

The issues that are clouding the matter for the jury right now is whether that termination notice was just, whether there were actual defaults on the part of the plaintiffs and whether Blackard was right in trying to terminate it for the—for grounds set out there. But I submit, Your Honor, that from the nature of the agreement Blackard had the right to terminate it and if he was wrong

in serving a termination notice the plaintiffs' proper remedy is an action for breach of contract and for damages, for failing to deliver the termination notice under the circumstances outlined in the contract, but breaching his contract by delivering the termination notice under other circumstances.'"

And at page 575:

"There has been no allegation that the equipment was not returned to the Plaintiffs as is provided by Plaintiffs' Exhibits 2 and 3 and under Plaintiffs' Exhibit 1 the equipment would not have to be returned to the plaintiffs.

But even if there were such proof and even if the complaint said that they had failed to return the equipment, which it doesn't, even then the proper action would be for breach of contract that Blackard had failed to comply with the terms of the contracts and had failed to return the equipment, so even then the complaint should be dismissed.'"

And at page 576:

"Now, the next matter in here that the plaintiffs complain about is that on the 20th day of April, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof. Now, what of it, Your Honor? If they admit, as all the evidence shows, that this termination notice was served on April 15th and that it purported to terminate the agreement on 24 hours' notice, and, if, as I say, their only

remedy is not to ignore the termination notice but to sue Blackard for breach of contract for serving a termination notice when he wasn't justified in serving it. So it makes no difference what happened on the 20th day of April, 1948."

And on page 578:

"That is the same issue as the other one, as long as it was undisputed here that the notice was served on April 15th it can't make any difference what happened on May 5th except in a damage suit for breach of contract and that is the sum total of the allegations in the complaint except for the damages asked and the injunctions asked, and I therefore ask the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence."

6. The Court erred in denying the motions made by defendants at the close of plaintiffs' case.

Defendants' counsel asked "that the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence" (Page 578).

At page 580:

"The Court. The motions are denied and the jury will be recalled."

At page 580:

"Mr. Cottis. I want to make two motions and the argument will be identical. I ask that the complaint be dismissed as to the defendant, Glen Phillips, because no testimony has been adduced

showing Phillips' liability and as a second motion I ask that the complaint be dismissed as to Larry Starns because nothing implicates Mr. Starns in this.

The Court. As to Starns there is enough evidence, in my judgment, to go to the jury. I am not certain as to Phillips, but that motion too will be denied at this time. Counsel may renew it at the close of the entire case."

7. The Court erred in not rejecting the verdict of the jury as to the defendant Starns.

Two days after the verdict was returned, the appellant moved the Court in part, as follows (TR. 13):

"1. That the verdict of the jury herein rendered on the 6th day of July, 1949, be rejected in its entirety for the reason that it is not supported by a preponderance of the evidence and was an advisory verdict only.

2. That the said verdict be rejected as to the defendant Laurence Starns for the reason that as to the said defendant such verdict is contrary to the weight of the evidence.

3. * * *

4. * * *

5. That the said verdict be rejected for the reason that the undisputed evidence showed a termination of the plaintiff's right of occupancy of the premises on 16 April, 1948, and the complaint alleges no wrong-doing prior to that date.

6. That the said verdict be rejected upon the ground that this court in determining the validity

of a temporary restraining order in this cause of necessity determined the issue of right to occupancy of the premises, and the said verdict is contrary to such determination."

The motion was denied through the rendition of judgment on November 4, 1949 (TR. 24).

8. The Court erred in refusing to make findings of fact and conclusions of law.

Appellant moved the Court (TR. 25):

"that counsel for both the plaintiffs and the defendants be required to submit proposed findings of fact, and the Court enter such findings as it may deem appropriate."

The Court denied the motion (TR. 26):

"Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, denied motion."

9. The Court apparently erred in permitting written instructions to go to the jury room with the following portion stricken (TR. 20):

"The defendants, Blackard, and Starns, in their testimony have denied the assertions of the plaintiff, Humphries, as regards the final written agreement and the oral modifications thereof."

Neither the Court nor counsel was aware that the instruction might have gone to the jury room in this form until the transcript was printed, at which time, through inadvertence, selected instructions from those

in the Court's file were included in the record. No exception was taken by appellant to the form of the instructions as given, and the instructions as read to the jury (TR. 850) did not include the stricken part.

Because of the fact that the jury apparently considered the written instructions with the stricken portion included, appellant submits that a jury may have drawn the inference that Blackard and Starns admitted the alleged oral modifications of the contract.

10. The amount of damages is not justified.

11. Punitive damages should not have been included.

The verdict of the jury included \$2,500.00 as punitive damages (TR. 12).

12. Testimony was improperly admitted over the objections of the appellant, exemplified by the following:

(a) Testimony regarding insurance coverage (TR. 793, 795, 797, 799).

(b) Testimony regarding a conviction for the illegal possession of moose meat (TR. 189-191, 340-348, 542-554).

(c) Introduction of irrelevant exhibits, such as a lease (TR. 450), a credit memo (TR. 486), a complaint in another action (TR. 126).

(d) Testimony concerning cost of equipment (TR. 136-144).

(e) Testimony tending to link appellant's name with notorious gamblers (TR. 819-822).

(f) Testimony attempting to show an illegal arrangement between defendants Blackard and Starns (TR. 789).

(g) Testimony regarding five additional seats at appellees' restaurant counter (TR. 151-152, 158, 485).

13. The Court erred in allowing mileage for plaintiffs as witnesses in the amount of \$255.00 apiece.

ARGUMENT.

Argument is in the same order as the specifications of error and the numbering is identical.

SECTION 1. REFUSAL TO INSTRUCT AS TO THE SIGNIFICANCE OF THE TERMINATION NOTICE.

Exhibit A, attached to the complaint, is a contract between the plaintiff Humphries and the defendant Blackard. During the trial, this contract was introduced as Plaintiffs' Exhibit 1 (TR. 84) and over objections a second version was received as Plaintiffs' Exhibit 2 (TR. 119). The contract was again introduced over objection as Exhibit No. 3 (TR. 123). The original exhibits have been withdrawn from the clerk's office at Anchorage and are in San Francisco; it is apparent from them that only Exhibit 1 was signed. The distinctions between the version of the

contract introduced as Exhibit 1, and that version introduced as Exhibits 2 and 3 are these:

(a) Exhibit 1 states (TR. 85):

“The parties understand that the present restaurant equipment is to be moved to a new location South of its present site.”

Exhibit 2 states (TR. 125):

“The parties understand that the present restaurant equipment is to be moved to a new location approximately 18' South of its present site.”

(b) Exhibit 1 states (TR. 85):

“At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory.”

Exhibit 2 states (TR. 125):

“At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory and allowed to move or sell additional equipment when agreement terminated.”

Both versions, however, are identical with respect to the following provision (TR. 86 and TR. 125):

“In event Humphries defaults in the terms of this agreement Blackard may terminate this one year agreement upon 24 hours notice.”

The evidence is clear that a termination notice was served on April 15, 1948 by Blackard. The deputy

marshal testified that the return was made by him (TR. 71):

“Q. (by Mr. Cottis). Mr. Hoff, I am going to show you what purports to be a notice dated April 15th and which has been marked Defendant's Exhibit ‘A’ for identification and which contains on the reverse side a statement dated March 10th (sic) bearing what purports to be your signature. I ask you whether that is your signature?

A. Yes, this is my signature.”

The service and the notice were further substantiated by the plaintiff Humphries (TR. 160 and TR. 161):

“Q. (by Mr. McCutcheon). Did Blackard ever attempt to terminate your lease, Mr. Humphries?

A. Yes, he did by Deputy Marshal serving the paper.

Q. Referring to Defendant's Exhibit ‘A’, is that the paper you received?

A. Yes, it is.

Q. And on what date did you receive that paper?

A. I believe that it was on the 15th day of April.

Q. It is dated April 15, 1948, addressed to:

‘Vernon Humphries,
Kenneth Havins and
Alaska Food Service,
Anchorage, Alaska.

Dear Sirs:

Please take notice that the agreement executed by us on 4 February, 1948, is hereby

terminated, such termination to be effective twenty-four (24) hours from the hour of receipt of this notice by you.

The defaults upon which this termination is based are:

(1) You have failed to provide the bond required by the contract.

(2) You have failed to pay me the amounts stipulated in the contract for your concession.

(3) You have failed to comply with the law, in that you illegally had moose meat upon the premises.

(4) You have failed to pay the expenses incurred by you.

Sincerely,

By /s/ Joe Blackard.' "

Had the trial (and the pleadings) been orderly, a defense to the complaint would have been the above notice and its service on April 15th. The attitude of the plaintiffs apparently was that Blackard was not justified in terminating the contract: thus, they tried to establish a waiver of the bond provision of the contract, an offset for the concession charges stipulated in the contract, a "frame-up" in connection with the moose meat conviction. So, the fact of the notice and its service came before the Court upon plaintiffs' direct case (TR. 72), and what should have been rebuttal to an affirmative defense also was introduced as part of the direct case. This confusion in presentation made it more than ever urgent that the jury be instructed clearly upon the legal effect of the termination notice.

SECTION 2. REFUSAL TO INSTRUCT THE JURY THAT PLAINTIFFS WERE TRESPASSERS FROM AND AFTER APRIL 16, 1948.

The same arguments apply in connection with this instruction as those set forth in Section 1, supra.

SECTION 3. REFUSAL TO INSTRUCT THE JURY REGARDING EVIDENCE AGAINST THE APPELLANT STARNES.

PART A. The complaint alleges that on April 20, 1948 defendants took possession of plaintiffs' storeroom. A portion of the evidence in this connection was (TR 178) (Testimony of Mr. Humphries):

"Q. And did you have another storeroom, did you say?

A. Yes, I did.

Q. And where was that storeroom located?

A. It was upstairs in back of the restaurant.

Q. And what did you do in connection with the storeroom?

A. I placed the padlock on it.

Q. And what date was that?

A. That was on the 21st day of May.

Q. And what was the value of the inventory contained in that storeroom?

A. Around \$2,000. I called the United States Marshal down and asked his advice upon the padlock of the doors until we had this straightened out.

Q. And did Mr. Blackard offer to purchase those supplies?

A. No, he refused to buy them and refused to let me sell."

Another portion was (TR. 229-230):

“Q. Now, what door was it that you say Joe locked?

A. That was the doors that Joe locked.

Q. That is the door into the entrance way to the basement?

A. We always had it locked. We always had a lock on there and we both had keys but Mr. Blackard taken and got another lock and put on there so that my key was no longer any good.

Q. And what date was that that you testified?

A. That was, I would say that was somewhere around the 15th of April.

Q. It was before that notice was served on you terminating the contract?

A. It was the same day.

Q. The same day?

A. Yes.”

(TR. 162):

“A. Because Blackard had placed a padlock and refused me entrance into the storeroom.

Q. When was that?

A. That was somewhere around the 14th of April. It was about a day before the notices was served on me.

Q. And what did you say he did?

A. He placed a padlock upon the door of the storeroom and permitted us to enter.”

Nothing anywhere in the record shows any involvement on the part of Starns either before or after the 15th of April in connection with any storerooms used by plaintiffs.

PART B. The complaint alleges that defendants neglected to provide light, heat and water in accordance with the agreement.

Testimony of Mr. Humphries (TR. 180):

“Q. Now, did Mr. Blackard pay for the heat?

A. No, sir.”

Testimony (TR. 182):

“The Witness. Joe Blackard and myself present and we was discussing heat. I was going to rent it out for \$250 a month——”

Testimony (TR. 182):

“Mr. Blackard agreed to take and pay of the lights, space and so forth in there, to furnish that upon this 6%.”

Testimony (TR. 185, 186):

“Q. (by Mr. McCutcheon). Did you ever have a discussion with Mr. Blackard with reference to the payment of the lights?

A. Yes.

Q. And when and where and in whose presence?

A. The first I knew he wasn't going to pay for them was when our lights were turned off at 12 o'clock. Mr. Blackard had them turned off and I rushed down to see what was the matter at the City Lights and they said 'You have never paid your light bill'. I ran back and got the contract and they called Joe Blackard up on the 'phone. 'Here under your agreement you are supposed to have the deposit up here' and Joe Blackard agreed that he would come back later

and settle it so they wouldn't turn the lights on. So I made the deposit."

Again, if there was any wrong done, the appellant Starns was not involved.

PART C. The complaint alleges that defendants conducted gambling games near the restaurant counter which interfered with their business.

Testimony of Mr. Humphries (TR. 166):

"Q. Were card games conducted?

A. Yes, they were.

Q. For money?

A. For money.

Q. Who owned the card games?

A. Joe Blackard.

Q. Do you know that?

A. I am positive.

Q. Did someone run the card games for him?

A. Yes.

Q. Who ran the card games for him?

Mr. Cottis. Your Honor, I object unless the witness explains how this knowledge came to him.

The Court. Overruled. You may answer.

Q. (By Mr. McCutcheon). Who ran the games for Mr. Blackard?

A. There was three different parties run it, one was commonly known here in town as Red That Runs Card Games, and Mr. Preston, that was two that I know and Barney—I can't recall Barney's last name right now but he is a very well known professional.

Q. Do you know they ran the card games for Mr. Blackard?

A. Knock poker."

Again, there is no connection with the appellant Starns.

PART D. The complaint alleges that defendants impaired plaintiffs' credit rating.

Testimony of Vern Humphries (TR. 176, 177):

“Q. What kind of a credit rating did you have when you opened the business?

A. I could go anywhere in town and buy anything I wanted.

Q. What kind of a credit rating did you have when you closed your business?

A. I couldn't borrow a penny.

Q. Do you know why your credit rating suffered?

A. Yes, I do.

Q. Why did it suffer?

A. It suffered because Joe Blackard maliciously called up different people around and said he was throwing me out, that I didn't have anything and that he was foreclosing.”

and testimony of Marvin Campbell (TR. 474-475):

“Q. When did you close the business down?

A. Somewhere around the 22nd of May.

Q. And why did you close it down?

A. Feelings just got too hot and business just disintegrated so that we just decided to just close it down.

Q. Now, what difficulties did you encounter?

A. We had lots. Feelings were just running too high.

Q. Feelings between whom?

A. Between Blackard and Phillips and myself and Mr. Humphries.

Q. What, if anything, did Mr. Blackard do that affected your business?

A. Well, he tried to ruin the credit rating.

Q. How did he do that?"

PART E. The complaint alleges that on May 5th the defendants maliciously prohibited the delivery of fuel oil.

No evidence appears in the direct case concerning this allegation. However, as part of the defendants' case, Mr. Heverling, one of the owners of the fuel company stated (TR. 647):

"and May 7th, which was the last, I delivered 234."

Same witness (TR. 647):

"Q. Mr. Heverling, in the plaintiff's complaint in this action that is being tried is the following allegation 'That on or about the 5th day of May, 1948 defendants [meaning Blackard, Phillips and Larry Starns] did with deliberate intent to injure plaintiff [meaning Vernon Humphries and Marvin Campbell] maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage.' Did any of those defendants ever prohibit the delivery of fuel oil to Humphries or Campbell?

A. No, sir."

PART F. The complaint alleges that defendants on May 5 took possession of the restaurant, locked the premises, and announced to plaintiff's customers that the premises were permanently closed.

Testimony of Marvin Campbell (TR. 476):

“Q. (by Mr. McCutcheon). Did Mr. Blackard at any time lock the front door?

A. Yes.

Mr. Cottis. Object to it as leading.

The Court. Overruled.

The Witness. He did, yes.

Q. (by Mr. McCutcheon). When?

A. On several occasions.”

Testimony of Vern Humphries (TR. 162):

“Q. Did he do anything else?

A. Yes, he changed the lock on the front door. He closed the place down at one o'clock, which we were operating 24 hours a day, put the stools on the counter, turned the stoves out and told customers that he had closed me out of business—I was no longer there.

Q. And on what date was this?

A. That was on the 15th day—night of the 15th of April, the same day he served the paper on me.

Q. And what did you do then?

A. I wasn't there at the time he locked the whole place up and I was called out about one o'clock at night from my home and I came down and consulted with the policeman and I asked Joe first to let me in and he yelled through the door I couldn't get in and I went to the police and they said the best thing I could do was consult an attorney the next morning, and which I did.”

Testimony of Vern Humphries (TR. 174):

“Q. Now, how long did you operate your business 24 hours a day?

A. Until the 15th of April.

Q. And that is when Mr. Blackard changed the locks on the front door, did he?

A. Yes, he changed—Mr. Campbell—Mrs. Campbell served eviction papers for them to move and likewise they served papers on me to move.

Q. Did you have a key to the other lock?

A. Yes I did.

Q. Who gave you that key?

A. Joe Blackard.

Q. Did you have an agreement with reference to the key?

A. Yes.

Q. And when did you have that agreement?

A. As I taken and bought the equipment in there and started in I had a key from them on until after noon of the 15th of April and he called the locksmith up and changed the locks on the doors.”

As appears from the entire record, counsel for plaintiffs frequently attempted subtly to lead the plaintiffs in their testimony to include the name of the appellant Starns, although, when they were not being led, the plaintiffs generally mentioned either the defendant Blackard or the defendant Phillips, but not Starns. After the above testimony, plaintiffs’ attorney inquired, apparently innocuously, of Humphries (TR. 175):

“Q. Who determined what hours you could operate your business?

A. Mr. Blackard and Mr. Starns.

Q. And when they closed the bar you closed the restaurant, is that correct?

A. Yes."

Appellant submits that such questions operated as a reminder that Starns should be included.

No witnesses other than the plaintiffs themselves gave any indication that Starns was involved in the operation of the bar, and many witnesses affirmatively indicated that Starns had no connection with either Blackard or Phillips other than as a creditor of Blackard's. Thus, the deputy marshal (TR. 71):

"Q. Was Mr. Starns present?

A. Not that I remember."

The witness Dorothy Cavin (TR. 443):

"Q. And when you negotiated that arrangement with them did Mr. Starns have anything to do with it?

A. I never knew that Larry Starns ever had anything to do with that because he never used to come in that I ever saw him."

The construction foreman, Earnest Schroeder (TR. 618):

"Q. When Mr. Blackard engaged your company to do work on the bar, was Mr. Starns also in consultation with you?

A. No, not with me.

Q. Your only agreement was with Blackard, then?

A. Blackard, yes."

and the same witness (TR. 619):

“Q. Did Starns ever confer with you with respect to any of these details?

A. No.”

Harold Bliss, the owner of the construction company (TR. 650):

“A. Yes, we done some work there for Joe Blackard on his back bar and remodeling the front of the building.

Q. Did you do any work for Larry Starns?

A. No.”

The witness William G. Spradlin (TR. 701):

“Q. Do you remember whether Mr. Phillips was there?

A. Yes, he was, he was tending.

Q. Did you ever see Mr. Starns on the premises?

A. No, sir.

Q. Did you ever have any dealings with Mr. Starns in connection with the Panhandle?

A. No, sir.”

The defendant Joe Blackard (TR. 748, 749):

“Q. Well, were you and Starns partners?

A. No.

Q. Did you have any interest in the liquor store?

A. None whatsoever.

Q. Was the liquor store connected in any way with the Panhandle premises physically? I mean were there any doors or anything like that?

A. No, there was a door led to the liquor store from the outside and one led into the Panhandle from the street.

Q. Did Starns have any interest in the Pan-handle Bar or restaurant business?

A. No, only interest he would have had would have been in case I defaulted on my lease he had a note saying that I had to pay him \$4,000 by the first of the year, '48 and \$6,000 by the first of the year of '50.

Q. Was that the total of your obligations as to Starns?

A. That is right, I bought a little stock from him that we used and had to pay back, too."

On the other hand, there was no doubt that the defendant Glen Phillips was a partner of Blackard at the time in question. Mr. Blackard testified (TR. 763):

"Q. What, if any, was Glen Phillips' position at the time?

A. Well, when we first opened up Glen worked as a bartender for a couple of weeks, maybe a month and he came in as a partner in the Pan-handle."

And on cross-examination (TR. 804):

"Q. Mr. Blackard, in whose name was the liquor dispensing license issued?

A. It was mine and then when Glen Phillips it went in the combined, they put it in my name and Glen's name. When Mr. Tibbitt and Mr. Hardy transferred the license to my name and then a couple of months later it was transferred over to Mr. Phillip's name and mine."

Plaintiffs' Exhibit 22, a sheaf of invoices, were marked "Blackard and Starns" (TR. 671). The orig-

inals of these invoices, defendants' Exhibit "L" did not bear such a notation, excepting for two of the items. Defendants' Exhibit "L" was produced from the office of the construction company, but the reposing place of Plaintiffs' Exhibit 22 pending the trial was apparently with plaintiffs or their counsel (TR. 665).

The notation on the two items of Exhibit "L" is explained by the construction company's bookkeeper, Frances Clay (TR. 776-777):

"Q. (by Mr. Cottis). Mrs. Clay, I invite your attention to the last two items of Defendants' Exhibit L which bear printed numbers 6302 and 6374 and dated March 23, 1948, and March 8, 1948, and particularly I invite your attention to the words 'Blackwell and Starns' on the first of those and 'Blackard and Starns' on the second of those, can you explain to the Court, if you know, the reason for that change in the billing at that time?

A. We did not know at the first of this work that Mr. Blackard wanted his bills separated this way so that he would know how he would pay for them or put them in his books.

Q. Did you ever have any conversation with Starns about the matter that you recall?

A. No, I did not.

Q. Then is it your testimony that Blackard requests that the bills be made out that way?

A. Yes."

The original of plaintiffs' Exhibit 22 and the original of defendants' Exhibit L have been transmitted to

the Court of Appeals. These are the only evidence, other than unresponsive testimony or testimony which was led chiefly from the plaintiff Humphries, which linked Starns with Blackard in any respect other than as a creditor.

SECTION 4. REFUSAL TO INSTRUCT THE JURY THAT THE PLAINTIFFS HAD FAILED TO PERFORM THEIR OBLIGATIONS UNDER THE CONTRACT.

The contract provided, in all versions (TR. 9):

“Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage, Humphries agrees to endeavor to obtain the highest possible grading thereunder.”

The City Sanitation Officer testified (TR. 682, 683):

“Q. Did the city have a grading system for restaurants at the time you were Sanitation Officer in April and May of 1948?

A. Yes.

Q. Could you tell us briefly what that grading system was?

A. Well, it was the grading system that is recommended by the United States Public Health Service grading restaurants, either Grade A or Grade B or Grade C.

Those in a Grade A classification were those that came up to all of the standards of the grading code.

Those in Grade B came up to all the standards with the exception of a few minor violations and Grade C just about anything went.

Q. Now, was Mr. Humphries' restaurant graded?

A. No, I went—called, or I am not sure whether or not called on Mr. Blackard, but someone from the Panhandle called and wanted the Panhandle Bar inspected to be graded and it never was—it never came up to any of the standards. In putting out these when I was grading them I thought it would be probably fair to the operators of these eating and drinking establishments before I put out any grade cards I first inspected them to give them an opportunity to come up to the Grade A standards before putting a Grade B or Grade C card in their restaurant or bar, whichever it happened to be, and the Panhandle Bar was never graded. That is, it was never given a grade card.

Q. Was that the bar or the restaurant?

A. That was the restaurant."

The contract in all versions provided:

"Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska."

The same witness (TR. 676):

"Q. Will you describe what conditions you found?

A. Well, when they opened it it was in a pretty fair condition, that is, from a sanitary standpoint, and the longer it opened it run down quite fast, that is, and the condition of the premises got progressively worse."

The same witness (TR. 677, 678, 679):

“Q. (by Mr. Cottis). Did there ever come a time when you had to condemn anything on the premises?

A. Yes.

* * * * *

The Witness. Yes. Yes, I did, one night I did after Mr. Blackard evidently was having some trouble and he was quite concerned about the fact that the restaurant part be kept in a good, sanitary condition because he was operating the bar just adjacent to it. And he called me one evening about 8:30, as I remember, and asked me if I would come down and check over the restaurant part of the Panhandle and I went down and at that time I found quite a number of food particles that were in very bad condition.

There was liver there—three or four pounds of liver—that had micrococci the size of a dollar and larger that were green-yellow. Now whether Mr. Humphries was using that to feed or was serving that or not I don't know, but if he wasn't he had no right to have it in an establishment like that.

Also there were some calves brains that had stood around without proper refrigeration in storage that had liquefied. They were no longer solid. They were in a gelatinous state. Those were the two things that impressed me most—that was the liver and the brains.

Then at that time the premises in general were in a very poor condition, that is, from a sanitary standpoint it was, things weren't clean at all—refrigerators were dirty, looked as though they hadn't been cleaned in two or three days. The shelves were the same.

Flour bin had mouse droppings in it as did the sugar containers, and in general it was in very poor shape. And at that time because of the condition and because of the previous warnings that I had given Mr. Humphries, I closed the place and I took the foodstuffs that I had condemned or taken out of there—the brains and the liver—I took them out to the City Dump and burned them. I went right out and saw to it that they were destroyed and not used for any other purpose.”

The judgment of conviction for illegal possession of moose meat was introduced as defendant’s Exhibit M (TR. 834, 835, 836, 837) and clearly showed another violation of the contract by the plaintiffs. This judgment was attacked on the trial through testimony on plaintiffs’ direct case (TR. 189-191, 340-348), where, if the trial had been in accordance with proper procedure, the judgment would have been immune from attack.

The other defaults specified in the termination notice (defendants’ Exhibit A) were somewhat disputed by the plaintiff Humphries in his testimony; and although appellant believes that the great weight of the evidence substantiated these defaults, he does not rely upon them in support of this section of his brief.

SECTION 5. REFUSAL TO INSTRUCT THE JURY CONCERNING DAMAGES FOR LOSS OF EQUIPMENT OR INVENTORIES.

Much testimony was admitted concerning the alleged cost of equipment to the plaintiffs (TR. 137-152).

This line of testimony began when plaintiffs offered their Exhibit 4 (TR. 136), a bill of sale in connection with the restaurant.

“Mr. Cottis. Your Honor, I have no objection to the offering on grounds of authenticity. I object to it on the grounds of relevancy. The document doesn’t show where these items were located. There is nothing connected with the matters at issue in this lawsuit.

The Court. Objection will be overruled at this time and it may be admitted marked Plaintiffs’ Exhibit 4. It may be read to the jury.”

Further objection was made (TR. 140, 141):

“Mr. Cottis. Your Honor, I object to this line of questioning on the grounds that it is irrelevant to any matters stated in the complaint unless the purpose of it is to show the capital investment of Mr. Humphries in this business.

The Court. Well, I presume it will be connected up by—it is merely preliminary, as I understand, as I understand, at this moment it isn’t relevant, but I assume that counsel isn’t just putting it in trivially.

Mr. Cottis. Very well.

The Court. Objection at this time will be overruled and, of course, if it isn’t connected up the Court will entertain a motion to strike and have the jury disregard it.”

An objection was made to Exhibit 5, a release from a former partner of the plaintiff Humphries (TR. 145):

“Mr. Cottis. I have no objection to the authenticity, Your Honor, I object to it on the grounds of irrelevancy, Your Honor.

The Court. Objection is overruled and it may be admitted and marked Plaintiff's Exhibit 5 and may be read to the jury.”

Defendants brought the matter up again (TR. 153):

“Mr. Cottis. Your Honor, I understand that all this is subject to my later motion to strike for reasons that it wasn't connected up in any way with the Complaint.

The Court. It may be so considered.”

Obviously, the jury must have taken into consideration the alleged values of some of the equipment to arrive at its verdict, since no damages shown in any other respect could conceivably have brought about such a verdict. This will appear from Section 10, *infra*.

SECTION 6. COURT SHOULD HAVE DISMISSED ACTION AS TO STARNs AT CLOSE OF PLAINTIFFS' CASE.

The only testimony purporting to involve Starns in any manner—in fact, the only testimony mentioning Starns by name—in plaintiffs' direct case appears at the following pages of the transcript: 71, 81, 86, 94, 98, 102, 103, 106, 108, 111, 117, 120, 121, 147, 149, 150, 151, 152, 154, 155, 156, 159, 163, 175, 196, 208,

209, 216, 221, 223, 271, 272, 273, 292, 299, 310, 314, 315, 316, 317, 334, 338, 339, 359, 384, 403, 440, 443, 458, 459, 460, and 489.

All testimony attempting to link Starns with Blackard or Phillips in any respect other than as a creditor was that given by the plaintiff Humphries; some significance may attach to the fact that Humphries mentioned Starns less and less in his testimony as Humphries became more tired.

SECTION 7. REJECTION OF APPELLANT'S MOTION TO REJECT THE VERDICT.

The matters concerned in the motion duplicate Specifications of Error herein and the arguments are identical.

SECTION 8. REFUSAL TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The case had been treated from the beginning as an equitable proceeding. A temporary restraining order had been granted in May of 1948 and after hearing had been vacated. In February of 1949, the defendants having been declared in default, hearing was held on a motion to set the matter for trial. The proceedings before the Court (number 14 in Appellant's Designation of Record, TR. 872) do not appear in the printed record but a transcript is in the file. The proceedings include the following:

“Mr. Nesbett (for the plaintiffs). No, your honor, jury is not compulsory under the wording of the section as I read it. I have the section in court marked if your honor cares to read it.

The Court. Well, does either party demand a jury concerning the damages. I realize the court may not be compelled to grant it, but I have made it a uniform rule here to grant a jury trial in every case where either of counsel asked for an advisory jury.

Mr. Cottis. The defendant does request an advisory jury, your honor. * * *

All matters alleged in the complaint as a basis for damages, excepting perhaps the alleged impairment of credit, are wholly dependent upon the issue of whether the plaintiffs had a right to possession of the premises. The cause falls within that category of equity jurisdiction described in 19 *Am. Jur.* at page 141 as “The court has inherent jurisdiction to prevent threatened disturbance of one who is in the peaceful use and enjoyment of real estate.”

Equity will retain jurisdiction of the cause despite the destruction of the building on the premises.

“The Court is not ousted of jurisdiction by reason of a change of circumstances which has made impossible the granting of equitable relief. * * * Again, where the only reason for not granting an injunction is that pending the suit the complainant’s lease expired, the complainant will not be turned out of court, but the bill will be retained for the assessment of damages.” (19 *Am. Jur.* p. 126.)

“Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation.” (19 *Am. Jur.* pp. 126, 127.)

“A part of the controversy should not be remitted to a court of law.” (19 *Am. Jur.* p. 128.)

In *Smith v. New England Aircraft Company* (69 A.L.R., p. 314), the Appellate Court in its opinion stated:

“Whether the case should have been retained for assessment of damages rested in the sound discretion of the trial judge. That was exercised against the plaintiffs and presents no error of law.”

That the District Judge in the instant case considered the matter appears from the striking of the words “at law” from the instructions (TR. 18).

Since the cause remained in equity, the verdict of the jury was entirely advisory and the Court should have made findings of fact.

“‘There is no process by which the chancellor can substitute the conscience or belief of a jury for his; and he must find the facts on his own responsibility.’ *Dunn v. Dunn* (1862) 11 Mich. 284. Under a constitution recognizing chancery jurisdiction, a statute giving a party in equitable causes a right to a jury trial with the same effect as in common-law actions is unconstitutional; the chancellor must ultimately decide the case on

the evidence. *Brown v. Buck* (*Brown v. Circuit Judge*) (1889) 75 Mich. 274, 42 N.W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438." (156 A.L.R. 1172).

"The first and elementary principle in dealing with advisory verdicts in equity is that no decree or judgment should be rendered directly upon the verdict itself, as in an action at law. After a final hearing on all questions of fact, including a hearing on the weight to be given to the jury's conclusions, the court should make its own findings of fact as a basis for the decree or judgment." (156 A.L.R. 1171).

"In this connection, however, it is essential, in any jurisdiction, that the statutes and rules of court be consulted as to the need of presenting definite requests for special findings by the court, for in the absence of such requests the requirement as to such findings may be deemed to have been waived, and a general finding be deemed sufficient. E.g., *Pence v. Garrison* (1884) 93 Ind. 345; *Chicago, I. & L. R. Co. v. Myers* (1914) 57 Ind. App. 458, 105 N.E. 445, 107 N.E. 296.

The proper practice in a court having consolidated jurisdiction and procedure, sitting with a jury, is thus described in *Stahl v. Gotzenberger* (1878) 45 Wis. 121: 'In all equitable actions the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence.

* * * When the jury have given their verdict, the case is then to be taken up by the court; and if the court is satisfied with the determination of the jury upon the issues submitted to them, he adopts

their findings as to such issues. If he is not satisfied with the finding of the jury, he may, either upon the application of a party or of his own motion, set aside such verdict and submit such issues to another jury; or, if he is satisfied that no aid will be obtained by such further submission, he may proceed to decide the issues without any further intervention of a jury. After a verdict has been rendered upon the issues submitted to the jury, the court hears the testimony on the other issues, not submitted to the jury, if there be any, and then, upon all the testimony in the case, including that given upon the trial of the issues by the jury, disposes of the whole case, and, by written findings of fact and conclusions of law, decides all the issues, and directs judgment.' In that case the court reversed the judgment because it appeared affirmatively that the court had never passed upon the issues in the action or ordered judgment. A general verdict had been taken as in an action at law, and the clerk had entered judgment, as of course, on the verdict. The above quoted description of the proper practice is insufficient, however, in one respect: The adoption of the jury's findings, if any express adoption or approval is made, will stand as the finding of the court on those issues. If made at all it must be made on the evidence. The proper practice, if any express adoption is made, is to insert it in the judge's final conclusions in his memorandum and order for a decree or judgment.'" (156 A.L.R. 1172).

The practice required by statute in Alaska appears at 55-8-1 A.C.L.A. 1949.

“Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action, and the verdict may be read as evidence on the trial of the action.”

The matter was considered by the District Court in Alaska in 1907 (*Juneau Water Co. v. Jualpa Co.*, 3 Alaska 382). In that case no findings or conclusions were made after an equity trial with an advisory jury. The court stated (page 387):

“It therefore becomes a question whether the written opinion of the court filed in the cause is to be taken as the formal findings of fact and conclusions of law required by the Code. A perusal of section 372, p. 226, of the Code of Civil Procedure of Alaska, referring to the findings, etc., in equity causes, and section 209, p. 186, of the Code referring to findings, etc., where the cause is tried by the court without a jury, make it plain that the opinion cannot, in any way one views it, be considered to be findings and conclusions, as required by the Code.”

Section 372, cited by the Court, is found at 55-8-1 A.C.L.A. 1949; Section 209 is similar to, but not identical with, 55-8-2 A.C.L.A. 1949.

“The establishing, by the codes, of a single system of pleading and procedure without distinction between equity and law, has led to many instances in which the court, or both court and counsel, have tacitly followed the usual routine through

trial and judgment, only to have the question later raised whether the case was one of equitable cognizance. Although this is erroneous procedure, the question whether an upper court will reverse the judgment on that ground depends largely on the inclination of the particular court, the degree of estoppel (see *infra*, VII c 3) applied against counsel who has concurred in the procedure, and the question whether errors in rulings and directions are shown to have been made at the trial. The question is as to the effect of the entry of judgment on the verdict with no record of findings having been made * * *

But the weight of authority is to the effect that where the court has simply ordered judgment on the verdict as in an action at law, the judgment cannot be supported on the theory that the judge has thereby adopted the verdict as his own findings. (Citing cases)" (156 A.L.R. 1195).

"Usually where error has occurred in this respect it has occurred in a court acting under the code system, so-called, in which distinctions in pleading and forms of action have been abolished and the two systems of jurisprudence merged. The number of cases under this system, found in the reports, in which judge and counsel have unsuspectingly followed the regular procedure of jury trials through to judgment, only to find on appeal that the case was technically in equity, is a strong argument for the two-sided court." (156 A.L.R. 1173).

"The court declared that 'the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at

common law. This was clearly an error. The case being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as a result of his own judgment, aided as is true, by the finding of the jury. Here the judgment is pronounced as a mere conclusion of law on the facts found by the jury." (156 A.L.R. 1175).

SECTION 9. STRIKING A PORTION OF THE TYPEWRITTEN INSTRUCTIONS.

The possible effect upon jury deliberations of the stricken portion of the Court's instruction 1-A (TR. 20) seems obvious, but appellant recognizes that he failed in his own duty to examine the instructions before they were handed to the jury.

SECTION 10. THE AMOUNT OF DAMAGES.

The restaurant business operated by plaintiffs was purchased for \$2250.00, according to the testimony of the person who sold it to the plaintiff Humphries (TR. 826, Clyde Graves).

"A. Vern Humphries and Kenneth Havins they bought the cafe from me; they paid me \$2250 for it. They paid me \$1150 in a check and \$1100 in cash."

According to the plaintiff Humphries, the purchase price was \$2500 (TR. 251, 252). In any event, there seems no dispute that 3 months later they could have sold the business for \$9000 plus the worth of the inventory on hand (TR. 179, Humphries):

“I had the business sold for \$9000 plus inventory and I brought the man to your office to close the deal and called Mr. Blackard up there and in his presence Mr. Blackard said ‘No, there would be no deal.’ ”

And the plaintiff Campbell testified (TR. 477, 478):

“Q. And did he make you an offer for the business?

A. Yes.

Q. How much was it?

A. He offered \$9000 plus inventory, as I remember it.

Q. And was that sale ever consummated?

A. No, it wasn't.

Q. Why not?

A. Because he stipulated that he wanted to get approval of all parties in this matter.

Q. And did he get approval of all parties?

A. No, he couldn't.

Q. Who didn't he get approval of?

A. Joe Blackard wouldn't approve.”

Similar testimony appears at TR. 533, 534.

With respect to possible loss of profits, the testimony indicated that the gross receipts of the business for the 21 days of March that it operated amounted to just under \$3100. The plaintiff Humphries (TR. 170): “First 21 days was \$3090.85”.

During the next month, April of 1948, Humphries testified (TR. 287):

“Q. Do you recall what it was during April?

A. I couldn't be exact but I believe during April the account ran up there, I wouldn't say unless I had the figures to look at.

Q. Do you think it was more than \$3000?

A. Yes, I think it were.”

During the 21 days of May, Humphries testified (TR. 286):

“Q. Well, your gross receipts of May of 1948 were over \$3000?

A. Yes, I have seen it; it is \$3000 and some odd—one hundred or two hundred or three hundred, I believe, and some odd dollars, and some cents.

Q. During May?

A. During May.”

Since receipts remained stable and since the sale price of plaintiffs' business more than tripled during the period concerned, the jury's finding of \$5935 compensatory damages is difficult to justify. Even if the complaint had been amended to allege a cause of action for interference with plaintiffs' sale of the restaurant, the evidence obviously shows no hint of any such interference by the appellant Starns.

SECTION 11. PUNITIVE DAMAGES ARE IMPROPER.

“Exemplary or punitive damages will never be awarded, it seems, the theory being that the complainant, by having applied to a court of equity, must be deemed to have waived all claim to recovery other than compensatory damages.” (19 Am. Jur. p. 125).

SECTION 12. EVIDENCE WAS IMPROPERLY ADMITTED.

Testimony was admitted concerning the alleged cost of restaurant equipment, concerning the business which the restaurant might have had if it had had five additional seats, concerning a conviction of the plaintiff Humphries for illegal possession of moose meat at the premises, concerning an eviction action brought by the mother of the plaintiff Campbell, (owner of the premises and landlord of the defendants); none of such testimony was properly before the Court. But appellant especially invites attention to testimony concerning fire insurance coverage and business interruption coverage carried by the defendant Blackard and admitted over repeated objections:

“Q. Do you recall whether or not you had the items insured that you purchased?

A. I didn’t—

Mr. Cottis. Objected to as immaterial and no relevancy.” (TR. 793).

“The Court. Very well, the objection is overruled, he may answer.” (TR. 794).

* * * * *

“Mr. Cottis. I object, your Honor, as completely irrelevant. This is obviously a fishing

expedition as to Joe's collectibility in case plaintiffs should——

The Court. Overruled."

(TR. 794).

"Q. How much were you to receive?

Mr. Cottis. I object as irrelevant.

The Court. Overruled."

* * * * *

"Mr. Cottis. May it please the Court, there was not a word in direct examination about insurance and this is an improper cross-examination when he gets into that subject and I object to the whole matter of insurance except as it has pertinency as to possible value or purchase price. If that is——

The Court. As far as the restaurant is concerned it is certainly revelant in my judgment."

(TR. 795).

"Q. Well, how much money and insurance did you collect altogether?

Mr. Cottis. I object, your Honor, as completely irrelevant.

The Court. Overruled."

(TR. 797).

"Mr. Cottis. Objection, your Honor, unless it is restricted to the cafe and even then I object because none of it has any bearing on the direct examination."

(TR. 799).

Surely, whether or not Blackard carried insurance could have no bearing upon whether the defendants

had wrongfully taken possession of a storeroom, or neglected to provide light, heat and water, or conducted gambling games, or maliciously impaired plaintiffs' credit, etc. But Blackard's testimony that he carried business-interruption insurance of \$37,500 would necessarily influence a jury, which would not understand that the face amount of such a policy is a ceiling and that the amount paid is determined by how long it takes, or should take, to establish a similar business in a similar location. With respect to any fire insurance carried by Blackard on restaurant equipment, appellant submits that from plaintiffs' exhibit I (the contract between Humphries and Blackard) there can be no doubt that Blackard owned some of the restaurant equipment. Since he had a right as owner to insure it, the matter of whether he did, whether he collected on the policy, and how much insurance he had were as irrelevant as whether he carried business-interruption insurance on his bar. The jury, however, could have concluded that Blackard had insured restaurant equipment which belonged to the plaintiffs and that (irrespective of the complaint) they should have a verdict adequate to compensate them for it.

SECTION 13. INCLUSION OF \$255 MILEAGE FEES FOR PLAINTIFFS AS PART OF COST.

Plaintiff's second amended cost bill (TR. 39), includes mileage fees for Humphries and Campbell
 " * * * from the point where said witness entered the

Territory of Alaska, to Anchorage, Alaska, a distance of 850 miles, at 15¢ per mile * * *'' and return. Appellant's attorneys filed objections (TR. 43) on these grounds: (a) that the point of entry was distant from the place of trial only 179 miles, or less; (b) that the cost bill does not disclose at what point the airplane carrying plaintiffs is alleged to have first flown over Territorial waters; (c) that mileage could not be allowed for more than 100 miles because no court endorsement had been made validating service beyond that distance; (d) that as a practical matter, the witnesses were not within reach of a subpoena until their airplane landed.

The Alaska statute provides that a witness is not obliged to attend a trial from more than 100 miles except that "the court or judge thereof, upon the affidavit of the party, or some one on his behalf, showing that the testimony of the witness is material and his oral examination important and desirable, may indorse upon the subpoena an order for the attendance of the witness; the service of such subpoena and order and the payment of legal fees to the witness are sufficient to require his attendance, if he be served within the Territory". (58-3-7, A.C.L.A. 1949).

The District Court, in its opinion regarding the cost bill, allowed the requested mileage fees largely in reliance upon the Ninth Circuit decision in *Deal v. United States* (1926; 11 F.2d 3; rev'd on other grounds, 274 U.S. 277, 47 S. Ct. 613, 71 L. Ed. 1045). The court there stated in part (p. 9):

"It is held that the adverse party is not entitled to complain of the failure to indorse on the subpoena an order requiring the attendance of the witness. If he attends, he is entitled to his mileage and per diem. We think that this construction of the statute is correct, and that defendants' exceptions to the mileage taxed were properly denied."

The only distinctions between the *Deal* case and the case at bar are: (a) in the *Deal* case the witness was subpoenaed; (b) the witness there was not a party; (c) the court did not have occasion to make the additional rulings arising from use of the airplane.

Appellant submits that the rule expressed in the District Court opinion (TR. 28 et seq.) is unsound: every airplane flight to Alaska first arrives over Territorial waters at a different point; a difference in routing would result in a capricious difference in mileage fees—e.g., a flight from Chicago to Anchorage via Seattle would result in a much higher allowance than the same flight from Chicago to Anchorage on the same airline at the same expense to the passenger, but routed via Edmonton and entering Alaska near Northway; likewise, a witness from Tokyo, entering the Territory at Shemya, would receive much more than a witness from Berlin, entering Alaska from the East. Unless a subpoena is endorsed, the opposing party has no means of obtaining a hearing as to the materiality of oral testimony of witnesses who may be entitled to two-way mileage at 15¢ per mile for

thousands of miles, even though their attendance at the trial was coincidental to other business which would have brought them to the place of trial in any event.

CONCLUSION.

Appellant Starns (TR. 814) was asked his relationship with Blackard, and he answered: "I loaned Mr. Blackard a sum of money in order that he could make the deal with Mr. Tibbitt and Mr. Hardy for the bar. And then in return for that he was to—I was to have space for a liquor store in that building."

When appellant was asked his relationship with Humphries or Campbell (TR 814), he replied: "I have never had any dealings with either one of them."

The Starns testimony is corroborated by Blackard and by all witnesses who testified on the subject excepting the plaintiff Humphries, who had been convicted of two crimes (TR. 836 and 841), and whose testimony was inconsistent in several respects. The Starns testimony is not disputed by any exhibit, and is somewhat strengthened (as to his relationship with Blackard) by the wording in the assignment of the lease from Tibbitt to Blackard and Starns (TR. 463): "as tenants in common, and not as joint tenants".

Justice requires that sufficient credence be given the Starns testimony and that enough weight be ac-

corded the errors at the trial to grant the appellant relief from the District Court judgment.

Dated, Anchorage, Alaska,
October 23, 1950.

Respectfully submitted,

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